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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1262

ALBERT G. AVERY,

Petitioner,

vs.

ROBERT W. OWENS, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, OF THE NEW YORK SUPREME COURT

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, OF THE NEW YORK SUPREME COURT

Petitioner prays that a Writ of Certiorari issue addressed to the Appellate Division of The New York Supreme Court, First Judicial Department, to review its final order made on January 27, 1966.

Opinions Below

The opinion and order of the Special Term of The New York Supreme Court is not reported but is set forth in the Appendix, pp. 1-2a. There was no opinion in the Appellate Division.

Jurisdiction

The order of the Appellate Division was made and entered on January 27, 1966; its order denying petitioner's

application for leave to appeal to the New York Court of Appeals was made and entered on March 29, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3), 62 Stat. 929.

Questions Presented

Petitioner wrote six letters to transfer agents of stock in his family trust and one to the administrator of the estate of the deceased trustee seeking to rescind stock transfers effected by respondent as attorney for an adverse trust claimant to his client, and to maintain the status quo pending a judicial determination of the claimant's rights therein. When sued by respondent for libel by innuendo, for general and punitive damages only in the sum of $1,050,000.00, petitioner accordingly pleaded the complete defense of qualified privilege which, under New York law, can only be overcome by proof of "actual" malice. Subsequently petitioner was given leave by the Special Term of the New York trial court to plead the further complete defense of the collateral estoppel of a prior decision and judgment in a judicial proceeding between petitioner and respondent's client, wherein respondent was her attorney, based upon these very letters, and determining that petitioner had acted under a color of right to protect a fund in which he had an interest from what he believed to be improper administration and wrongful distribution. Nevertheless the Special Term and Appellate Division denied petitioner's motion for summary judgment on the alleged ground this defense raised triable "issues". The Appellate Division then denied petitioner's motion for leave to appeal to the New York Court of Appeals, despite the federal Constitutional claim, seasonably asserted, that this determination deprived petitioner of his rights under the First and Fourteenth Amendments. The following questions thus are presented:

1. Was petitioner deprived of his rights under the First and Fourteenth Amendments, in a suit de-

pending upon libel by innuendo only, to which the complete defense of qualified privilege was interposed and admittedly was applicable, where respondent, in opposing summary judgment, submitted no evidence of actual malice or damage and plaintiff's proof negated the existence of such malice?

2. Was petitioner denied due process of law under the Fourteenth Amendment by the refusal of the state courts to hold that the prior determination he had acted under color of right to protect a fund in which he had an interest in publishing the letters conclusively negated the existence of actual malice?

Statutes or Constitutional Provisions Involved

The First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment; the Due Process Clause of the Fourteenth Amendment; New York Civil Practice Law and Rules, Sec. 5602(b)1 (Laws of 1962, ch. 308, Sec. 5602) precluding review by the New York Court of Appeals without leave of the Appellate Division.

Statement of the Case

Following termination of a family *inter vivos* trust in Vermont, of which petitioner is a vested remainderman, on December 7, 1962 on the death of the last income beneficiary and also the sole trustee (petitioner's mother, Mrs. Josephine G. Avery), the trust bookkeeper, Emilie B. Bender, who had access to the trust safe deposit box in Vermont, appointed her New York attorney, the respondent Owens, her "deputy" on December 20, 1962 (70). On December 24th respondent entered the Vermont box, removed all the trust securities and cash, then worth

upwards of $158,000, to New York City and set about transfering one third thereof to his client Bender, knowing that petitioner was then claiming she had released any interest in the trust by an instrument under seal executed November 29, 1939 of which she had delivered a duplicate to petitioner (9-10). The bearer bonds and cash passed by delivery, the trust stocks, all registered in the name of the deceased trustee, were assigned by respondent's clients, Bender and Katherine A. Feuerlicht, allegedly as trustees under a 1939 trust deed amendment appointing them trustees "in event" of the death of the then sole trustee, Josephine G. Avery, *supra*, at a time when her husband Brainard was also a life income beneficiary (19).

There is a settled body of law[1] that there can be no "trustees" of a trust after it has vested, terminated and ceased to exist; that if, as here, the sole trustee is then also deceased the duties of accounting, winding up and distribution devolve upon her personal representative, in this case the Vermont administrator of her estate, and no one else. Petitioner reasonably relied upon this law and believed, in consequence, that the only lawful and sensible construction of the 1939 trust amendment, *supra*, was to provide "trustees" to continue an active trust for the remaining lifetime of the income beneficiary, Brainard Avery, "in event" the then sole trustee, Josephine, predeceased him, an "event" that did not occur since he died in 1947 and she in 1962 (62-3). The letters complained of made all this abundantly clear (Complaint, Exs. A-G incl. Appendix, pp. 24-36a). Respondent admittedly never disclosed Bender's instrument of release of November 29, 1939, *supra*, to the transfer agents in

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[1] See *Friedley* v. *Security Trust & Safe Deposit Co.*, 10 Del. Ch. 74, 84A, 883; *Matter of Luckenbach*, 267 App. Div. 275, aff'd 292 N. Y. 674; 1 *Restatement: Trusts* (2nd ed.) Sec. 104, p. 233; 1 *Perry: Trusts* (3rd ed.) Secs. 264, 269, 344.

securing the transfers of trust stocks into her name (10, 50-1), nor does he claim to have disclosed this rule of law.

On learning of the transfers early in January, 1963 petitioner wrote six of the letters complained of to the respective transfer agents, setting forth the foregoing in great detail, quoting from or inclosing copies of the Bender release, demanding that the transfers to her be rescinded and that the status quo be preserved until litigation to resolve all these questions could be begun in the Chancery Court of Vermont where the trust had its only situs, seat of administration and domicile of the sole trustee over the last twenty-two years of its existence (10; see *Avery* v. *Bender et al.*, 124 Vt. 309, 204 A 2d 314). On February 20, 1963 he wrote the seventh letter to the Vermont administrator, stressing the latter's duties and responsibilities in the forthcoming litigation, begun eight days later and still pending, wherein the Vermont Supreme Court has held the administrator was an indispensable party (*id.*, cf. *Hanson* v. *Denckla,* 357 U. S. 235).

Four months later, in June, 1963, respondent, as attorney for Bender and Feuerlicht, instituted a proceeding in the New York Supreme Court, wherein the Vermont administrator was not joined (cf. *Hanson* v. *Denckla, supra*), seeking, among other things, to enjoin petitioner from interfering with his clients as "trustees" by publishing the letters and proceeding with the prior Vermont suit (*Matter of Feuerlicht etc.* v. *Avery,* 28-9). A motion to dismiss for lack of jurisdiction of the subject matter was made and denied at Special Term and the denial affirmed without opinion by the Appellate Division (*id.*, 19 A. D. 2nd 862). Issue was then joined and all issues were sent to a Special Referee to hear and determine them (12). At the trial on February 5, 1964 petitioner testified for his clients on the "interference" issue and the seven letters in question and *also* the libel complaint, verified only three weeks earlier, were placed in evidence (12-13).

Ten months later, on December 7, 1964, the Special Referee filed his decision wherein he found that petitioner, in publishing these letters, and others,

> "* * * had acted under some color of right, to protect a fund in which he had an interest from what he believed to be improper administration and wrongful distribution." (68)

Final judgment on this decision was entered on December 16, 1964 by petitioner's attorneys (31-3). It "denied" respondent's prayer for injunctive relief, on the merits, and is now final (33).

Petitioner was then granted leave in the libel suit to amend his answer and plead, in addition to the complete defense of qualified privilege, previously pleaded, the complete collateral estoppel of this prior decision and judgment as conclusively negating the existence of any actual malice (3). On the pleadings, as thus amended, petitioner then moved for summary judgment dismissing the libel complaint, pursuant to New York CPLR Sec. 3212.[2] The Special Term, by its order and decision of July 20, 1965, denied the motion on the ground this defense raised triable "issues", including the "extent" of the Referee's finding, *supra*, and the "role" of respondent as an attorney of record (31) in the prior litigation (3-4). On January 27, 1966 the Appellate Division, First Department, affirmed without opinion; on March 29, 1966 it denied, without opinion, petitioner's application for leave to appeal to the New York Court of Appeals, thus denying him review by the state court of last resort. Under New York state practice an appeal from affirmance of a denial of summary judgment by the Appellate Division does not lie, as of right, to the Court of Appeals, even if a federal

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[2] The New York state equivalent of FRCP 56.

Constitutional question is directly presented[3] (CPLR Sec. 5602 (b) 1, *supra*).

Meanwhile, on February 21, 1966 this Court decided *Linn* v. *United Plant Guard Workers of America*, 383 U. S. ——, 34 USLW 4136, 4139, holding:

> "We therefore limit the availability of state remedies for libel to those instances in which a complainant can show that defamatory statements were circulated with malice and caused him damage."

And on March 21, 1966, Mr. Justice Douglas, concurring in *Memoirs of a Woman of Pleasure* v. *Massachusetts*, 383 U. S. ——, 34 USLW 4236, 4240-1, said:

> "We faced the difficult questions the First Amendment poses with regard to libel in *New York Times* v. *Sullivan*, 376 U. S. 254, 269, where we recognized that 'libel can claim no talismanic immunity from constitutional limitations', * * * But the First Amendment, written in terms that are absolute, deprives the State of any power to pass on the value, the propriety or the morality of a particular expression" (citing cases).

See also Mr. Justice Black, dissenting in *Rosenblatt* v. *Baer*, 383 U. S. ——, 34 USLW 4111, 4118, decided February 21, 1966. The *Linn*, *New York Times* and *Rosenblatt* decisions were all duly brought to the attention of the Appellate Division in support of petitioner's federal Constitutional claim as Point II of his brief on final submission of petitioner's application for leave to appeal to the New

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[3] *Cohen & Karger: Powers of the New York Court of Appeals* (revised), p. 251: "Interlocutory or intermediate determinations are not appealable as of right, even if a constitutional question is directly presented" (*Paige* v. *Squier*, 254 N. Y. 551; *Smith* v. *La Guardia*, 368 N. Y. 632; *Matter of Greenwald* v. *Finnegan*, 272 N. Y. 509).

York Court of Appeals on March 15, 1966; the opinion in *Memoirs, supra,* had not then been handed down (Appendix pp. 4-5a; cf. *Lynum* v. *Illinois,* 368 U. S. 908).

Reasons for Granting the Writ

I

It is well settled that there are only four main categories of privilege applicable to libel suits: (1) absolute immunity or indefeasible privilege protecting communications pertaining to judicial proceedings; (2) qualified or defeasible privilege; (3) publication of official reports; (4) fair comment (1 *Harper & James; The Law of Torts* (1956 ed.), Sec. 5.21, pp. 419-20). Consequently the New York Court of Appeals has held that in cases involving either the alleged libel of a public official or qualified privilege generally, where actual malice must be established to overcome the privilege, it is incumbent on the plaintiff, in opposing a defendant's motion for summary judgment dismissing the complaint, to come forward with proof of actual malice, otherwise there is no triable issue and the complaint must be dismissed. (*Shapiro* v. *Health Ins. Plan,* 7 N. Y. 2d 56; *Sheridan* v. *Crisona,* 14 N. Y. 2d 108; *Schneph* v. *New York Post Corp.,* 16 N. Y. 2d 1011). In this Court this requirement has been squarely based upon federal Constitutional grounds (*New York Times* v. *Sullivan, supra,* 376 U. S. 254; *Henry* v. *Collins,* 380 U. S. 356; *Linn* v. *United Plant Guard Workers of America, supra,* 383 U. S. ——, 34 USLW 4136, 4139).

In two of the above New York cases, *Shapiro* and *Sheridan, supra,* the Special Term, as here, denied summary judgment on the ground there were triable issues as to the existence of actual malice, the Appellate Division, Second Department, as here, affirmed without opinion but *then* granted leave to appeal to the Court of Appeals where the decision was reversed and the complaint dismissed for lack of any actual proof of such malice. Petitioner could not

reasonably anticipate here that the Appellate Division, First Department, would ignore these controlling precedents and thus deny him review by the state court of last resort, particularly after the federal Constitutional question posed by the decisions above cited had been called specifically to its attention. Thus it is plain that petitioner has been discriminated against by the circumstance that respondent filed his libel suit in the First Judicial Department (where he has his office) rather than in the Second (where he resides)[4] and that petitioner's rights under the First and Fourteenth Amendments have suffered in consequence.

Admittedly the letters in question passed solely between parties having a lawful business interest in their subject matter. Thus they were within the broad definition of qualified privilege laid down in *Cheatum* v. *Wehle,* 5 N. Y. 2d 585, 595, 599, followed in *Shapiro, supra.* Indeed the only opposition to summary judgment at all was an affidavit of respondent's (plaintiff's) counsel, stating (47):

> "The plaintiff has repeatedly stated and states again that he made no objection to defendant's assertion of his claims and what he believed to be his rights, however erroneous or unjustified they might have been * * *. This libel action was not predicated upon the assertion of his contentions, but was based solely upon the libelous material that he unnecessarily inserted in the letters he wrote."

However, the complaint pleads only alleged libel by innuendo (App., 15-23a), not libel *per se,* and it is well settled that

> "The kind of malice necessary to defeat the protection of the privilege has nothing to do with the

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[4] The Appellate Division of the New York Supreme Court is divided into four judicial departments. The New York City boroughs of Manhattan and Bronx only are in the first department, the remaining boroughs are in the second department.

> 'malice' that is said to be 'presumed' from the publication of false and defamatory matter. Such fictitious 'malice' is rebutted by the circumstances that create a privilege. The malice must be real and genuine" (1 *Harper & James, op. cit., supra,* Sec. 5.27, p. 451).

Thus the power to "presume" malice merely from publication

> "* * * is not a means of escape from constitutional restrictions (*Bailey* v. *Alabama,* 219 U. S. 219, 239); the showing of malice is not presumed but is a matter of proof by plaintiff." (*New York Times* v. *Sullivan, supra,* 376 U. S. 254, 284 and cases cited.) Libel "can claim no talismanic immunity from constitutional limitations" (*id.* at 269).

II

This Court has limited the availability of state remedies for libel to those instances in which the complainant can show actual malice and actual damage (*Linn* v. *United Plant Guard Workers of America, supra,* 34 U.S.L.W. 4136, 4139). At least two members of the Court, additionally have pointed out that the First Amendment, made applicable to the states by the Fourteenth Amendment, is absolute in terms, that it constitutionally safeguards freedom of expression regardless of its value, propriety or morality, that state libel laws are an abridgement of this freedom, that the free discussion guaranteed by the First Amendment may not be penalized by judgments in state court libel actions (cf. Douglas J., concurring in *Memoirs of a Woman of Pleasure* v. *Massachusetts, supra,* 34 U.S.L.W. 4236, 4241; Black, J., dissenting in *Rosenblatt* v. *Baer,* 34 U.S.L.W. 4111, 4118; *Linn* v. *United Plant Guard Workers of America, supra,* 34 U.S.L.W. 4136, 4140; *New York Times* v. *Sullivan, supra,* 376 U. S. 254, 293). In the *New York Times* case this Court was openly shocked by the fact of a civil libel judgment for one thousand times the maxi-

mum criminal penalty in Alabama (367 U. S. 276). But here the amount sought, in punitive and alleged general damages only, is two thousand one hundred times the $500 New York penal law maximum fine (*Penal Law, McKinney ed.*, Secs. 1341, 36). And in the penal law (Sec. 1346) a communication qualifiedly privileged "is presumed not to be malicious."[5] As was held in *New York Times* v. *Sullivan* (376 U. S. 276):

> "What a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."

The Appellate Division subverts this rule, even as it has declined to give effect to the rule of the New York Court of Appeals that

> "If the defendant made the statements in good faith, believing them to be true, he will be protected, even if a man of wider reasoning power or greater skill in sifting evidence would have hesitated." (*Cheatum* v. *Wehle, supra,* 5 N. Y. 2d 585, 599, citing *Pecue* v. *West,* 233 N. Y. 316, 322).

This is so, where the purpose of the communications was lawful, as here, even though "strong and plain" words may be used, in the absence of proof of actual malice. Intent makes the libel in such a case, "strong words do not" (*Klinck* v. *Colby,* 46 N. Y. 427, 434 and cases cited).

III

Comparison of the allegations, as regards alleged "interference", in the prior litigation (*Matter of Feuerlicht,*

[5] Sec. 1346 provides: "A communication made to a person entitled to, or interested in, the communication by one who was also interested in, or entitled to make it, or who stood in such a relation to the former as to afford a reasonable ground for supposing his motive innocent, is presumed not to be malicious and is called a privileged communication." See also Rives, C.J., dissenting in *Curtis Pub. Co.* v. *Butts,* 321 F. 2d 702, 726, No. 814, October Term, 1965.

etc. v. *Avery, supra;* 20-26) with the innuendoes alleged in the libel complaint (Appendix, pp. 15-23a incl.) discloses a complete identity of issues in both litigations based upon these very letters which, as stated, were received in evidence at the trial of the prior proceeding along with the libel complaint itself (20-29, 12-13). Since there was complete identity of issue and it has now been judicially determined that petitioner acted under a color of right to protect a fund in which he had a lawful interest, the prior decision and judgment constitute a conclusive collateral estoppel on the question of petitioner's good faith which, as noted, respondent did not even attempt to impeach by the submission of any contrary proofs below (39-70; *Israel* v. *Wood Dolson Co.*, 1 N. Y. 2d 116.) Respondent, as attorney for petitioners in the prior litigation, had an interest therein by reason of his attorney's lien (*New York Judiciary Law*, Sec. 475[6]), thus he is bound by these prior findings and judgment against his clients (*Souffront* v. *Compagnie des Sucreries*, 217 U. S. 475, 486-7; *Restatement: Judgments*, Sec. 84, *Comment b*, p. 391; 1 *Freeman: Judgments* (5th ed.) Sec. 434, p. 948; 2 *Black: Judgments* (2nd ed.) 539; 30A Am. Jur., *Judgments*, Sec. 431, p. 482 and cases; *Good Health Dairy Prod. Co.* v. *Emery*, 275 N. Y. 14, 18). Where, as here, petitioner's conduct has once received judicial approval in the form of a direct adjudication, it cannot thereafter be collaterally attacked in another litigation (See *Lane* v. *Rushmore*, 123 N. J. Eq. 531, 546, 198 A. 872, aff'd 125 N. J. Eq. 310, 4 A. 2d 55, cert. den. 307 U. S. 636).[7] Thus the first requirement, of the

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[6] "From the commencement of an action, special or other proceeding in any court * * * the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim which attaches to a verdict, report, determination, decision or judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; * * *."

[7] Petitioner has been a member of the Bar of this Court since March 1936.

Linn case, *supra*, for state libel action, proof of actual malice in a qualified privilege case, not only is wholly lacking, it was conclusively negatived by the prior decision and judgment on which petitioner is entitled to rely if he is not to be denied due process of law in violation of the Fourteenth Amendment.

Likewise the second requirement of actual damage (*Linn, supra*) is not met by a complaint in astronomical round figures only since it does not seek special damages (*Drug Research Corp.* v. *Curtis Pub. Co.*, 7 N. Y. 2d 435, 441), but where the letters themselves do not impugn respondent's reputation, ability or credit, special damages must be pleaded (*O'Connell* v. *Press Pub. Co.*, 214 N. Y. 352, 358). And in the absence of a showing of actual malice, special damages must be pleaded or the complaint will be dismissed (*November* v. *Time, Inc.*, 13 N. Y. 2d 175, 180 and cases cited). By denying petitioner access to the New York Court of Appeals, without opinion, the Appellate Division has deprived him of the benefit of these controlling rules of law, thus denying him due process.

IV

The test for review on certiorari is not whether the Appellate Division order herein be denominated as "final" under local rules of practice "but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court." (*Department of Banking* v. *Pink*, 317 U. S. 264, 268.) That is abundantly plain from the record here. The Appellate Division has now finally adjudicated, contrary to decisions of this Court, that proof of actual malice is not required to overcome the complete defense of qualified privilege, whether applied to criticism of a public official or in the course of an owner's justified protection of his own property; that a prior binding adjudication that petitioner

acted under color of right and in good faith does not negate the existence of such actual malice, contrary to all principles of collateral estoppel by judgment as laid down in *Souffront* v. *Compagnie des Sucreries, supra,* 217 U. S. 475, 486-7; that a state civil libel action for two thousand one hundred times the maximum state penal provision may be maintained although, by statute, penal prosecution is expressly proscribed in a qualified privilege case and such communication "is presumed not to be malicious" (*N. Y. Penal Law,* Sec. 1346, *supra*), despite this Court's declaration that a state may not accomplish in the civil law of libel what is constitutionally prohibited in its criminal law, since libel has no "talismanic immunity from constitutional limitations" (376 U. S. 269); that triable "issues" exist as to the "extent" of the prior adjudication, although it is axiomatic that the scope, extent and effect of a legal decision are solely questions of law;[8] that this suit may be maintained in the absence of any claim of actual special damage although where malice is not shown and special damages are not claimed, the complaint must normally be dismissed.

These federal Constitutional questions were directly and explicitly raised under Point II in petitioner's brief in the Appellate Division on his motion for leave to go to the Court of Appeals (Appendix 4-5a; *Lynum* v. *Illinois,* 368 U. S. 908). Petitioner could not reasonably anticipate that the Appellate Division, by its affirmance without opinion, would not apply the controlling decisions of the New York Court of Appeals, herein set forth. Indeed, he could not even anticipate reasonably that he would be denied review by that Court in view of the previous practice in identical situations, heretofore set forth, long established in the Appellate Division, Second Department

[8] One can imagine, for example, the "extent" that a rural Mississippi jury might give to *Brown* v. *Board of Education,* 347 U. S. 483, if this question was submitted to them.

(*Shapiro* v. *Health Ins. Plan, supra,* 7 N. Y. 2d 56; *Sheridan* v. *Crisona, supra,* 14 N. Y. 2d 108). Thus it is plain that he has been denied the further state court review that he would have been entitled to by the Second Department under these controlling decisions, through no fault of his own; that the First Department's refusal to consider the federal Constitutional questions, seasonably presented at the first available opportunity, has denied petitioner due process of law and that such questions have been properly raised (see *Brinckerhoff-Faris Co.* v. *Hill,* 281 U. S. 673, 677-8; *Great Northern R. Co.* v. *Sunburst Oil Co.,* 287 U. S. 358, 367; *Missouri* v. *Gehner,* 281 U. S. 313, 320; *Ohio* v. *Akron Park District,* 281 U. S. 74, 79; *Saunders* v. *Shaw,* 244 U. S. 317, 320; *Cole* v. *Arkansas,* 333 U. S. 196, 200). Plainly local procedure can not be used to stifle a federal claim or evade a vindication of federal rights (*Davis* v. *Wechsler,* 263 U. S. 22, 24-5).

The question thus is now ripe for adjudication in this Court, even though a trial may still be technically permissible under the local state practice (*Pope* v. *Atlantic Coast Line R. Co.,* 345 U. S. 379, 382, *Richfield Oil Corp.* v. *State Board,* 329 U. S. 69, 72; *Construction Workers* v. *Curry,* 371 U. S. 542, 550; *Mercantile N. Bank* v. *Langdreau,* 371 U. S. 555, 558).

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

April 22, 1966.

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New York, N. Y. 10006.

Statute Involved

New York Civil Practice Law and Rules, Consolidated Laws, Chap. 8, 1962, Chap. 308—Article 56—Appeals to the Court of Appeals

Sec. 5602. Appeals to the Court of Appeals by Permission

* * * (b) *Permission of appellate division.* An appeal may be taken to the court of appeals by permission of the appellate division:

1. From an order of the appellate division which does not finally determine an action, * * *.

Order and Opinion of the New York Supreme Court.

SUPREME COURT OF THE STATE OF NEW YORK,

SPECIAL TERM PART I, NEW YORK COUNTY.

at the Courthouse thereof, 60 Centre Street,
New York, New York, 10007.

Present: HON. THOMAS DICKENS, *Justice.*

[SAME TITLE]

The following papers numbered 1 to 11 read on this motion, submitted by Court No. 43 on Calendar of Jul 12 1965.

Order and Opinion of the New York Supreme Court.

	Papers Numbered
Notice of Motion and Affidavit Annexed Exhibits	1– 7
Answering Affidavit & Exhibits	8–10

Upon the foregoing papers this motion by defendant for leave to serve an amended answer is granted. The amended answer, in the form annexed, shall be served within ten days after service of a copy of this order with notice of entry. That branch of the motion which seeks summary judgment as against the plaintiff, pursuant to CPLR 3212, is denied. Numerous questions of fact are raised in the papers submitted hereon, not the least of which concerns the plaintiff's role in the prior proceedings involving the trust in question. It is certainly not clear whether the Special Referee, in that prior proceeding, held that the defendant was not guilty of malice in writing the allegedly libelous letters. The extent of the referee's finding is itself in issue. Thus, this Court is unable to find that the Special Referee's determination was dispositive of the cause of action asserted in the instant action. Accordingly, summary judgment may not be granted, and a trial of this action is merited.

Dated, July 20, 1965.

T. D.,
J. S. C.

Briefs: Plaintiff's √, Defendant's √.
County Clerk's No. 3672, 1964

Spec I Liber 015 Line 4, 1965

Order of Affirmance of the Appellate Division.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 27th day of January, 1966.

Present—Hon. FRANCIS L. VALENTE, Justice Presiding,
" JAMES B. M. MCNALLY,
" SAMUEL W. EAGER,
" ARON STEUER,
" G. ROBERT WITMER,
Justices.

[SAME TITLE]

An appeal having been taken to this Court by the defendant-appellant from so much of an order of the Supreme Court, New York County entered on the 23rd day of July, 1965, as denied defendant's motion for summary judgment, and said appeal having been argued by Mr. Richard Steel, as counsel for the appellant and by Mr. Edward S. Bentley of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so far as appealed from be and the same is hereby affirmed with $30 costs and disbursements to the respondent.

ENTER:

HYMAN W. GANSO,
Clerk.

Petitioner's Reply Memorandum in Appellate Division on Motion for Leave to Appeal to the Court of Appeals.

II

ANY OTHER RULE WOULD ENCOUNTER GRAVE FEDERAL CONSTITUTIONAL DIFFICULTIES UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

A privileged free discussion, protected by the First and Fourteenth Amendments, may not be penalized by judgments for damages in libel actions (Black, J., dissenting in *Linn* v. *United Plant Guard Workers of America,* 382 U. S. ——, 34 USLW 4136, 4140, citing *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 293; *Garrison* v. *Louisiana,* 379 U. S. 64, 79; *Rosenblatt* v. *Baer,* 382 U. S. ——, 34 USLW 4111, 4118). Thus the power to "presume" malice merely from publication ". . . is not a means of escape from constitutional restrictions (*Bailey* v. *Alabama,* 219 U. S. 219, 239); the showing of malice is not presumed but is a matter of proof by plaintiff" (*New York Times Co.* v. *Sullivan, supra,* 376 U. S. 254, 284 and cases cited). For

> ". . . libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." (*id.* at p. 269)

Hence the Constitution requires that there be proof of actual malice in a case involving qualified or defeasible privilege (*id.* at p. 283).

> "We therefore limit the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage" (*Linn* v. *United Plant Guard Workers of America, supra,* 382

Petitioner's Reply Memorandum in Appellate Division on Motion for Leave to Appeal to the Court of Appeals.

U. S. ——, 34 USLW 4136, 4139, decided February 21, 1966).

Both of these requirements are missing here: there is no showing by plaintiff of evidentiary facts of actual malice and, in a suit based upon communications charging him, by innuendo only, with improper action in a single isolated legal matter, there is no claim whatsoever of special damage (cf. *Shapiro* v. *Health Ins. Plan, supra; Drug Research Corp.* v. *Curtis Pub. Co., supra; Amelkin* v. *Commercial Co.*, 17 N. Y. 2d 500, Advance Sheets of March 2, 1966).

Order Denying Leave to Appeal.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 29th day of March, 1966.

Present: Hon. JAMES B. M. MCNALLY,
Justice Presiding
" SAMUEL W. EAGER,
" ARON STEUER,
" G. ROBERT WITMER,
Justices.

[SAME TITLE]

The above named defendant-appellant having moved for leave to appeal to the Court of Appeals from the order of this Court, entered on the 27th day of January, 1966,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Richard Steel in support of said motion and the memorandum of Messrs. Bentley & Owens in opposition thereto, and after hearing Mr. Richard Steel for the motion, and Messrs. Bentley & Owens opposed,

It is hereby unanimously ordered that the said motion be and the same is hereby denied with $10 costs.

Enter,

HYMAN W. GANSO,
Clerk.

Complaint.

SUPREME COURT,

NEW YORK COUNTY.

[SAME TITLE]

The plaintiff above named by BENTLEY & OWENS, his attorneys, complaining of the defendant alleges as follows:

FOR A FIRST CAUSE OF ACTION

1. That at all the times hereinafter mentioned, the plaintiff was and now is an attorney and counsellor at law of the State of New York, and resided and now resides in the City and State of New York.

2. That at all the times hereinafter mentioned, the defendant was and now is an attorney and counsellor at law of the State of New York, and resided and now resides and maintains an office in the City, County and State of New York.

3. That the plaintiff was admitted to the Bar of the State of New York on or about January 20, 1920, and continuously thereafter has been and now is engaged in the practice of law in the City and State of New York, specializing in trusts, estates and fiduciary matters; that he is a member of the firm of Bentley & Owens, attorneys and counsellors at law of the State of New York, having an office at No. 20 Exchange Place, City, County and State of New York.

4. That at all the times mentioned, the plaintiff was and now is attorney for one Emilie B. Bender individually,

NOTE: The pleadings were not reproduced in the record on appeal herein for the reason that they were before the Appellate Division on a prior appeal (37-38), hence they are included in this Appendix.

and that from and after December, 1962, the plaintiff was and now is attorney for the said Emilie B. Bender and for one Katharine A. Feuerlicht (formerly Katharine A. Coggeshall) as trustees of the trust hereinafter described.

5. That all the times hereinafter mentioned the said Bender and the said Feuerlicht and the defendant were and now are residents of the City, County and State of New York.

6. That on or about September 12, 1921, in the City and State of New York, one Brainard Avery and Josephine Gray Avery, his wife, then residing in the City and State of New York, executed and delivered a deed of trust or trust agreement in writing, dated that day, wherein and whereby they assigned and transferred certain personal property therein more particularly described to certain trustees therein named, in trust however, to hold possession thereof, and to invest and reinvest the same, and to collect the income therefrom, and, after deducting certain charges and expenses, to pay over the balance of the income as therein provided; that said trust was to continue during the joint lives of Brainard and Josephine and the survivor, and, upon the death of the survivor, the trust was to terminate and the trust estate was to be distributed as therein provided.

7. That, thereafter, pursuant to a reserved power of amendment contained in said deed of trust, the said settlors, Brainard and Josephine, amended the said trust agreement at least six times.

8. That said trust agreement provided in paragraph (d) of Article II thereof as follows:

> "(d) At Brainard's decease, said Trustees become responsible for said Trust Estate in the condition in

which it then is at that time, and shall hold, manage, invest and reinvest said Trust Estate for the beneficiary or beneficiaries herein provided, subject to the laws of the State of New York, governing and controlling the acts of Trustees."

9. That pursuant to the so-called "Fourth Amendment" of said trust, dated April 23, 1937, the settlors provided that, if Josephine should survive Brainard, the income of said trust should be distributed by the trustee or trustees thereof to Josephine for her life to the extent of two-thirds of the income until she had received $4,000 a year, and to the said Emilie B. Bender to the extent of one-third of the income, until she should have received $2,000 a year, and that any income in excess of $6,000 a year should be distributed as therein provided.

10. That it was further provided in said Fourth Amendment that, upon the decease of the survivor of Brainard and Josephine, the principal of the trust estate should be distributed as follows: Two-thirds thereof to the defendant Albert G. Avery and to the said Katharine A. Feuerlicht, children of the settlors, share and share alike, and the remaining one-third to the said Emilie B. Bender, if she should then be living.

11. That pursuant to so-called "Sixth Amendment" of said trust, dated November 28, 1939, the settlors provided as follows:

"In event of the death of Josephine Gray Avery, the sole trustee, Emilie B. Bender and Katharine A. Coggeshall are hereby appointed joint trustees, said appointment to become effective on the day of Josephine's death."

12. That on or about March 18, 1937, the settlors appointed the said Bender as sole trustee of said trust in the place and stead of the New York Trust Company which they "removed" as trustee on that date; that on or about April 9, 1937, the settlors appointed the said Brainard Avery (one of the settlors) to act with the said Bender as trustees of said trust; that on or about June 13, 1938, the settlors "removed" the said Brainard Avery as trustee; that on or about November 28, 1939, the settlors "removed" the said Bender as trustee, and appointed the said Josephine G. Avery (one of the settlors) as sole trustee of the trust in her place and stead. That in each of said cases the trustee was not removed for cause, and, in changing the trustee, the settlors followed the provisions of the trust agreement relating to the "removal" of a trustee, because said agreement contained no provision for the resignation of a trustee.

13. That on or about November 29, 1939, the said Bender executed and delivered to the settlors an instrument dated that day reading as follows:

> "For Value Received, I, Emilie B. Bender, sole trustee of the Avery Trust under Deed of Trust dated September 12, 1921, and amendments thereto, and acting only as Trustee, and not individually, do hereby sell, assign, transfer and set over unto my successor trustee of said Avery Trust, Josephine Gray Avery, of Middletown Springs, Vermont, the entire trust fund as it exists on November 29, 1939, and described as follows:
>
> (a) Cash on hand which has been accounted for; and
>
> (b) All and singular the items of personal property, particularly described in an inventory book (with

a flexible leather cover, which inventory book is annexed to and made a part hereof. The items of property specifically and particularly described in said book are listed on pages on which is endorsed the following:

'Nov. 29, 1939, E.B.B. Tr.'

Original certificates, notes, deeds, documents, etc. are on deposit in safe deposit at Empire Safe Deposit Co., which safe deposit box I have turned over to Mrs. Avery, new trustee, intact.

The principal of this Trust Fund is delivered by me, as trustee and depositary, and I pass on the titles as trustee the same as I received them without any personal responsibility or claim against me as trustee by anyone who is now or may be interested in said trust fund, and without any claim by me against any part of said principal or income, which I hereby expressly waive. I agree to promptly execute any papers necessary or advisable in effectuating the record transfer from me as trustee to the new trustee.

In Witness Whereof, I have set my hand and seal and delivered these presents all this 29th day of November, 1939.

EMILIE B. BENDER (L.S.)

In Presence of:
BRAINARD AVERY''

14. That at all times up to the death of the said Josephine as hereinafter set forth, the said Bender acted as clerk and bookkeeper of the trust and maintained the accounts, books and records of the trust in the City, County and State of New York where she resided.

15. That on or about June 22, 1941, the said Brainard rented a safe deposit box in the Killington National Bank (now Vermont Bank & Trust Company) at Rutland, Vermont, in the name of "Brainard Avery or Emile B. Bender" and thereafter placed the trust securities therein, where they remained up to the date of death of the said Josephine as hereinafter set forth.

16. That on or about February 6, 1947, the said Brainard died leaving a last will and testament which was duly admitted to probate by the Probate Court of the District of Rutland, Vermont, wherein he appointed his said widow Josephine and the said Bender as his executrices; that the said Josephine and Bender duly qualified as executrices and thereafter acted as such.

17. That thereupon and in or about February, 1947, the name in which the said safe deposit box was carried was changed so as to provide the access either by the said Bender, as originally opened, or by the said Bender or Josephine as executrices of the estate of Brainard Avery and that at no time was any restriction placed upon the right of access to said box by the said Bender.

18. That at all times the said Bender had right of access to the said safe deposit box, and from time to time exercised such right of access, with the knowledge of the said Brainard and Josephine, and, after the death of Brainard, with the knowledge of the said Josephine.

19. That the defendant is a son of the said Brainard and Josephine, and is one of the remaindermen of the said trust.

20. That on December 7, 1962, the said Josephine died, a resident of Middletown Springs, Vermont, leaving a last

will and testament which was, on January 4, 1963, duly admitted to probate by the Probate Court of the District of Rutland, Vermont; that on or about January 27, 1963, the said Probate Court of the District of Rutland, Vermont, appointed one Henry C. Bigelow, as special administrator, pending the appointment of an administrator with the will annexed of said estate.

21. That on December 10, 1962, the said Bender duly qualified as one of the successor trustees of said trust and the plaintiff notified the defendant thereof; that on December 12, 1962, the said Feuerlicht duly qualified as one of the successor trustees of said trust, and, upon information and belief, notified the defendant thereof.

22. That on December 24, 1962, pursuant to authorization and instructions duly given by the said Bender, the plaintiff entered said safe deposit box, and removed the trust securities therefrom, and caused them to be transmitted to a bank in the City and State of New York, for the account of the said trustees.

23. That the securities so removed and transmitted to New York, consisted of the following:

50 sh. American Can Co., capital stock,
100 sh. American Cyanamid Co., common stock,
180 sh. American Telephone & Telegraph Co., common stock,
106 sh. Chase Manhattan Bank, capital stock,
100 sh. Consolidated Edison Co. of New York, common stock,
100 sh. General Electric Co., common stock,
150 sh. General Motors Corp., common stock,
100 sh. Socony Mobil Oil Co., common stock,
100 sh. Standard Oil Co. (New Jersey), common stock.

40 sh. Union Carbide Corp., capital stock,

$10,000. par value, New Jersey Turnpike Authority, 3⅜% bonds, due July 1, 1988,

$10,000. par value, American Telephone & Telegraph Co., 3¾% bonds, due August 1, 1980,

$10,000. par value, U. S. Treasury 2½% bonds, due March 15, 1971,

$10,000. par value, Pennsylvania Railroad Co., 4¼% bonds, due April 1, 1981,

$6,000. par value, Port of New York Authority, 3⅜% bonds, due May 1, 1988,

$35,000. par value, U. S. Treasury 3½% bonds, due November 15, 1998,

$10,000. par value, Ohio Turnpike 3¼% bonds, due June 1, 1992,

$800. par value, City of New York 3% bonds, due 1980,

Royalty agreement with Humble Oil & Refining Co. of Dallas, Texas,

Award of the Mixed Claims Commission.

24. That thereupon the said Feuerlicht and Bender, as trustees as aforesaid, caused certain of said shares of stock and bonds to be transferred and distributed to the said Feuerlicht, and to the said Bender, and tendered to the defendant, in equal shares, the shares of stock and the bonds distributed or tendered to each, being as follows:

16 sh. American Can Co., capital stock

33 sh. American Cyanamid Co., common stock

60 sh. American Telephone & Telegraph Co., common stock

35 sh. The Chase Manhattan Bank, capital stock

33 sh. Consolidated Edison Co. of New York, common stock

33 sh. General Electric Co., common stock

50 sh. General Motors Co., common stock

33 sh. Socony Mobil Oil Co., Inc., capital stock
33 sh. Standard Oil Co. (New Jersey), capital stock
13 sh. Union Carbide Corp., capital stock
$3,000. par value, New Jersey Turnpike Authority, 3⅜% bonds, due July 1, 1988
$3,000. par value, American Telephone & Telegraph Co., 2¾% debentures, due August 1, 1980
$2,000. par value, U. S. Treasury 2½% bonds, due March 15, 1971
$3,000. par value, Pennsylvania Railroad Co., general mortgage 4½% bonds, due April 1, 1981
$2,000. par value, Port of New York Authority, 3⅜% bonds, due May 1, 1988
$10,000. par value, U. S. Treasury 3½% bonds, due November 15, 1998
$3,000. par value, Ohio Turnpike 3¼% bonds, due June 1, 1992,

and, in addition, caused to be assigned to each of said persons, the following:

A one-third interest in the aforesaid Humble Oil & Refining Co. royalty agreement,
A one-third interest in the aforesaid award of the Mixed Claims Commission.

25. That on and prior to the times hereinafter stated in this cause of action, the defendant had full knowledge of the facts hereinbefore alleged.

26. That on or about January 9, 1963, in the City of New York, the defendant willfully and maliciously composed and published a letter writing dated that day, a copy of which is hereto annexed and marked Exhibit A, and caused said writing to be transmitted and delivered to

White & Case, Esqs., of No. 14 Wall Street, New York, New York, attorneys for Bankers Trust Company, transfer agent of the capital stock of American Can Company, and copies thereof to the Bankers Trust Company, attention of Mr. Erickson of the Stock Transfer Department, and to George G. Smith of Rutland, Vermont.

27. That in and by said writing the defendant stated and represented to said persons, and to the attorneys in the office of White & Case, and to persons in the office of the Bankers Trust Company, and intended them to believe,—

(a) that the plaintiff had knowingly, fraudulently and unlawfully procured the transfer of 50 shares of the stock of American Can Company, constituting part of the trust securities, to his said client Bender and others, and the delivery of the stock certificates for said shares to himself, by falsely representing to Bankers Trust Company, the transfer agent of said stock, that the said Bender was a trustee of said trust and authorized (with her co-trustee) to assign said stock as trustees, and to receive one-third of said shares as remainderman of the trust, whereas in fact she was not a trustee and was not authorized to assign or transfer said stock as trustee or to receive any part of the shares so assigned, and, by instrument dated November 29, 1939, had released all her right to the principal and income of said trust;

(b) that the plaintiff had knowingly, fraudulently and unlawfully concealed from said transfer agent knowledge of said instrument dated November 29, 1939 with the intention to deceive said transfer agent and to procure the transfer of said shares, which would not have been made if the existence of said instrument had been disclosed.

28. That the said statements contained in said writing were false and known by the defendant to be false in that,—

(a) the safe deposit box in which the trust securities were kept stood in the name of the said Bender individually, and the said Bender and Josephine as executors of the last will and testament of Brainard Avery, deceased; the said Bender at all times had unlimited and unrestricted right of access to said box; as trustees of said trust residing in the City and State of New York, it was the right and duty of said trustees to take possession of the trust securities and remove them to New York, and to wind up the trust and distribute the principal of the trust in the manner provided in the trust agreement;

(b) the said Bender and Feuerlicht were the duly qualified and acting trustees of said trust, and had the right and duty to distribute the assets of said trust in accordance with the provisions of the trust agreement, and said transfer was requested and made in accordance with the terms of said trust agreement, viz., one-third thereof to the said Feuerlicht, one-third thereof to the defendant, and one-third thereof to the said Bender;

(c) the said instrument dated November 29, 1939 was not a release, and did not affect or purport to affect the rights of the said Bender in and to the principal or income of said trust, or her right to receive the shares of stock transferred to her as aforesaid.

29. That by reason of said publication, the plaintiff has been greatly injured in his credit and professional reputation and has suffered great pain and mental anguish to his damage in the sum of $50,000.

SUMMARIES OF SECOND THROUGH SIXTH CAUSES OF ACTION OF COMPLAINT (PARAGRAPHS 30-54 INCLUSIVE)

For a Second Cause of Action

Similar to the first cause of action except based upon letter to General Motors Corp., dated January 9, 1963 (Exhibit B), and omits paragraph 28(a) of the first cause of action.

For a Third Cause of Action

Similar to the first cause of action except based upon letter to General Electric Co., dated January 15, 1963 (Exhibit C), and alleges, in addition to paragraph 27(a)(b) thereof, subparagraph (c):

> "(c) that in procuring said transfer, the plaintiff and the said Bender had cheated and defrauded the defendant and had violated the criminal statutes of the State of New York and of the United States of America for which they were subject to criminal prosecution."

Also, in addition to paragraph 28(a)(b) of the first cause of action, it alleges subparagraph (c):

> "(c) the said instrument dated November 29, 1939 was not a release, and did not affect or purport to affect the rights of said Bender in and to the principal or income of said trust, or her right to receive the shares of stock transferred to her as aforesaid."

For a Fourth Cause of Action

Similar to the third cause of action, except based upon letter to W. K. Rieber, Assistant Treasurer of the Chase Manhattan Bank, dated January 16, 1963 (Exhibit D)

and alleges in addition to paragraph 37(a)(b) and (c), *supra*, subparagraph (d):

> "(d) that when the plaintiff tendered to the defendant one-third of the shares of stocks, bonds and other assets of the trust, constituting part of the principal of the trust, being the portion to which the plaintiff claimed that the defendant was entitled the plaintiff failed to tender to the defendant any part of the assets making up the balance of the trust principal, but retained the same for or on account of his fees as attorney; that in so doing the plaintiff had violated principles of legal ethics and had also violated criminal statutes of the State of New York for which he might be subject to criminal prosecution."

Also, in addition to paragraph 28(a)(b)(c) in the third cause of action, it alleges in subparagraph (d):

> "(d) the remaining assets of the trust received by the trustees were sold and the proceeds deposited partly in a savings account, and partly in a checking account, and were held by the trustees pending the completion of the administration of the trust and the settlement of the trustees' account."

For a Fifth Cause of Action

Similar to the first cause of action, except based upon letter to Morgan Guaranty Trust Co., of N. Y., attention Mr. C. C. Cahill at said trust company, transfer agent for Standard Oil Co. (New Jersey), dated January 19, 1963 (Exhibit E), and alleges a new paragraph, 47(b):

> "(b) that in obtaining possession of the bearer bonds forming part of the principal of the trust, the plaintiff and the said Bender had, by use of fraud and deceit, deprived the defendant of property to which he

was lawfully entitled, and that in so doing had violated criminal statutes of the State of New York and of the United States of America for which they were subject to criminal prosecution."

For a Sixth Cause of Action

Similar to the first cause of action, except that it is based upon letter to American Telephone & Telegraph Co., dated January 21, 1963 (Exhibit F), and to paragraph 27(a)(b) is added subparagraph (c) as set forth in the third cause of action, *supra*.

FOR A SEVENTH CAUSE OF ACTION

55. The plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs 1 to 25 of the First Cause of Action with the same force and effect as if herein set forth at large.

56. That on or about February 20, 1963, in the City of New York, the defendant wilfully and maliciously composed and published a letter writing dated that day, a copy of which is hereto annexed and marked Exhibit G, and caused said writing to be transmitted and delivered to Henry C. Bigelow at Middletown Springs, Vermont.

57. That in and by said writing, the defendant stated and represented to the said Henry C. Bigelow and intended the said Henry C. Bigelow to believe,—

(a) that the plaintiff and his client Bender had knowingly, fraudulently and unlawfully obtained access to a safe deposit box that was maintained by the trust in a Vermont bank by using a limited right of access to said box given to his client Bender for the sole purpose of cutting and removing the coupons upon the bonds held by the trust, and, using such limited

right of access, had wrongfully and unlawfully removed from said box the trust securities kept therein by Josephine, the deceased trustee;

(b) that the plaintiff had knowingly, fraudulently and unlawfully procured the transfer of shares of stock constituting part of the trust securities to his said client Bender and others, and the delivery of said shares to himself, by falsely representing that the said Bender was a trustee of said trust and authorized, with her co-trustee Feuerlicht, to assign such stock as trustees, and to receive one-third of said shares as remainderman of the trust, whereas in fact she was not a trustee and was not authorized to assign or transfer such stock as trustee or to receive any part of the shares so assigned, and, by instrument dated November 29, 1939 had released all her right to the principal and income of said trust;

(c) that the plaintiff had knowingly, fraudulently and unlawfully concealed from the transfer agents of said stock, knowledge of said instrument dated November 29, 1939, with the intention to deceive said transfer agents and to procure the transfer of said shares, which would not have been made if the existence of said instrument had been disclosed;

(d) that in procuring the said transfers, the plaintiff and the said Bender had cheated and defrauded the defendant had violated criminal statutes of the State of New York and of the United States for which they were subject to criminal prosecution.

58. That the said statements contained in said writing were false and known by the defendant to be false in that,—

(a) the safe deposit box in which the trust securities were kept stood in the name of the said Bender

individually, and the said Bender and Josephine as executors of the last will and testament of Brainard Avery, deceased; the said Bender at all times had unlimited and unrestricted right of access to said box; as trustees of said trust residing in the City and State of New York, it was the right and duty of said trustees to take possession of the trust securities and remove them to New York, and to wind up the trust and distribute the principal of the trust in the manner provided in the trust agreement;

(b) as trustees of said trust residing in the City and State of New York, it was the right and duty of the trustees to take possession of the trust securities and remove them to New York, and to wind up the trust and distribute the principal of the trust in the manner provided in the trust agreement;

(c) the said Bender and Feuerlicht were the duly qualified and acting trustees of said trust, and had the right and duty to distribute the assets of said trust in accordance with the provisions of the trust agreement, and said transfer was requested and made in accordance with the terms of said trust agreement, viz., one-third thereof to the said Feuerlicht, one-third thereof to the defendant, and one-third thereof to the said Bender;

(d) the said instrument dated November 29, 1939 was not a release, and did not affect or purport to affect the rights of the said Bender in and to the principal or income of said trust, or her right to receive the shares of stock transferred to her as aforesaid.

59. That by reason of said publication, the plaintiff has been greatly injured in his credit and professional reputa-

tion, and has suffered great pain and mental anguish to his damage in the sum of $50,000.

WHEREFORE, the plaintiff demands judgment against the defendant in the sum of $350,000, and, in addition thereto, for the sum of $700,000 as punitive damages or a total of $1,050,000, together with the costs and disbursements of this action.

BENTLEY & OWENS,
Attorneys for Plaintiff,
Office and Post Office Address,
20 Exchange Place,
New York 5, N. Y.

Verified January 16, 1964.

Exhibit A, to Complaint.

(See opposite ☛)

EXHIBIT "A"

ALBERT G. AVERY
70 PINE STREET
NEW YORK 5, N. Y.
WHITEHALL 3-0077

FOR
AND ANS. BY

JAN 11 8 54 AM 1963
WHITE & CASE

January 9, 1963

RECEIVED
TRUST DEPARTMENT
EXAMINATION & CONTROL DIV.
JAN 21 1963
DO NOT FILE UNLESS INITIALED BELOW
ANS'D. BY
NO ANS. REQ.

Messrs. White & Case,
Attorneys for Bankers Trust Co.,
14 Wall Street,
New York, N.Y.

Josephine G. Avery, Trustee u/a 9/12/21
50 shares American Can Co.

Dear Sirs:

Supplementing my letter of the 8th in this matter, one point therein indicated that I am specifically requesting you instruct your client to provide is rescission of the stock transfer consummated by Bankers Trust Co., as Transfer Agent and reclamation of the stock certificates delivered by it(Mr. Erickson) to Robert E. Owens, Jr., on December 28, 1962 as heretofore detailed(21 days after the death of the registered owner of the stock) pursuant to Section 168 of the Personal Property Law(Section 7 of the Uniform Stock Transfer Act) on the ground that the indorsement and delivery of these 50 shares were made: (a) by fraud(concealment of the release of the transferee, Bender, heretofore mentioned, dated November 29, 1939), (b) under circumstances making the indorsement and delivery inquitable; (c) without legal authority from the owner of the stock(the personal representative of the deceased Trustee, Josephine G. Avery, her executor) and(d) three weeks after the owner's death on December 7, 1962 as heretofore advised. The transfer was not made to a bona fide purchaser acting in good faith, for value and without notice of these facts, nor has the injured party elected to waive the injury or been guilty of laches, having been first advised of the matter, yesterday, January 8, 1963. Thus Section 168 is applicable in all its particulars.

The Transfer Agent is not aided by General Business Law, Sec. 359-p (Uniform Act for the Simplification of Fiduciary Security Transfers), as claimed by its Mr. Erickson, since it honored the worthless indorsement on the trust stock certificate of alleged "successor trustees" after the trust had terminated and who were not the "registered owner" of the certificate as provided in this statute. It did so without receiving reasonable or lawful evidence of the indorsers' authority at a time when it had actual notice of the death of the trustee and registered owner and termination of the trust. It was likewise charged with knowledge of the New York law that on that event legal title to the stock in question(sometimes called "administrative title" since the stock had actually then vested in the trust remaindermen, my sister and myself) belonged to the personal representative of the registered owner and deceased trustee Josephine G. Avery.

I am today advised by The Chase Manhattan Bank and other Transfer Agents of stock held by this trust that it would, as Transfer Agent, immediately rescind and cancel a tranfer inadvertently made under these conditions when brought to its attention(unless, of course, Bender has meanwhile sold her stock thus secured to a bona fide purchaser for value without notice of the foregoing). Other Transfer Agents involved advise they are investigating the matter. Thus Bankers Trust Co., can not be said to have acted "reasonably" in transfering this stock when presented to it by a stranger to this trust(Owens) who could only produce legally insufficent documentation in support of his claims and who presumably did not disclose the aforesaid general release of his client(Bender) to any "principal or income" of this trust(quoting from the release itself).

EXHIBIT A.

Exhibit B, to Complaint.

(See opposite ☛)

EXHIBIT "B"

ALBERT G. AVERY
70 PINE STREET
NEW YORK 5, N. Y.
WHITEHALL 3-0077

STOCK TRANSFER
JAN 14 1963
DEPARTMENT

January 12, 1963

T. O. Macdonald, Jr., Transfer Agent,
General Motors Corporation,
Stock Transfer Department,
1775 Broadway,
New York 19, N.Y.

Josephine G. Avery, Trustee u/d 9/12/21
150 shares General Motors Corp.

Dear Mr. Macdonald:

I have your letter of the 11th advising you have consummated transfer of the above stock at some unspecified date. On the 10th Robert W. Owens, Jr., 20 Exchange Place, New York 5, N.Y., tendered me the 50 shares in my name that you mention if I would first execute a receipt recognizing the right of Emilie B. Bender to 1/3 of the total which I, of course, declined to do, she having duly released any claim to this Trust by her release under seal executed and delivered for a valuable consideration on November 29, 139 as per the inclosed photocopy made from a conformed copy of the original in my possession, given me by Bender herself and conformed in her own handwriting. It was prepared by my Father, the trust settlor and life tenant, Brainard Avery, an attorney of 40 years standing in 1939(who died February 6, 1947), was dictated by him to her, typed by her on the machine in his library at Middletown Springs, Vt., and covered trust property which then had its only legal situs in Vermont where seals have their effect at common law of dispensing with consideration, although there was also, in fact, ample valuable consideration, i.e., the approval of Bender's accounts as retiring trustee in favor of Josephine G. Avery, without a formal accounting or judicial settlement—a very valuable consideration indeed. It means what it says.

Presumably this release was not disclosed by Owens when he procured the transfer to Bender of 50 shares mentioned in your letter. Other Transfer Agents in this city have advised me they would not make such transfers if the existence of this release was disclosed to them in advance. Accordingly demand is hereby made upon you, pursuant to Section 168 of the N.Y. Personal Property Law(Sec. 7 of the Uniform Stock Transfer Act) that you rescind and cancel forthwith the transfer of 50 shares to Emilie B. Bender and divide the same into two 25 share certificates to the two vested remaindermen of this trust equally entitled thereto: my sister, Mrs. Katharine A. Feuerlicht, 510 East 23rd Street, New York 10, N.Y., making a total of 75 shares to each of us, also that you instruct Owens to surrender the certificate in Bender's name and forthwith forward to me the 50 share certificate you have given him standing in my name(with the same treatment as to my sister's 50 share certificate).

Since my letter of the 7th I am advised that at some unknown date the trust safe deposit box in the name of Josephine G. Avery, Trustee at the Killington Office of the Vermont Bank & Trust Co., was cleaned out after December 11th(when opened in my presence for the sole purpose of securing the Trustee's will which was probated January 4, 1963 at Rutland, Vt., with George G. Smith named as executor).

EXHIBITS B Com. Motion 1/12/65

EXHIBIT "B"

The matter was presented by me on the 10th to the New York County District Attorney's Office which has concluded that it is one for the federal authorities since interstate lines are involved. Since Bender alone had access to the box, for the limited purpose only, as the Trustee's bookkeeper(the Trustee was then nearly 89 and dying with cancer), it may be assumed that she went to Vermont after December 21, 1962 and accomplished such removal while probate proceeding were pending, they having been instituted on December 12th.

This demand is made upon you under all of the provisions of Sec. 168 of the Personal Property Law, supra: (a) the transfer was procured by fraud in the concealment from you of the inclosed release under seal; (b) it occurred under circumstances making indorsement and delivery inequitable since Owens who presented the stock was a stranger to this Trust and you had notice of its termination, thus inquiry would have disclosed the pendency of Probate Proceedings at the time of the transfer and of the fact that administrative title for transfer purposes and indorsement had vested solely in the personal representative of the then deceased registered owner, Josephine G. Avery, Trustee; (c) transfer was done without legal authority of the registered owner of the stock or her duly authorized personal representative, her executor, Smith; (d) the transfer occurred subsequent to the death of such legal and registered owner, the deceased Trustee, then, en instante, the trust terminated and its corpus(including this stock) became divisible only in equal shares to the two trust remaindermen, my sister, Mrs. Feuerlicht, and myself, as noted.

As further provided in Section 168, the injured party, myself, has not elected to waive the injury, nor is he guilty of laches, notice having been given to you by me on January 7, 1963, the very day that I was alerted by another corporation with a New York Transfer Agent, Consolidated Edison Co., of N.Y., of the possibility of the foregoing.

Kindly acknowledge receipt of the inclosed. Awaiting your advices, I am

Very truly yours,

1 incl a/s

P.S. It should be obvious to anyone that if Bender was acting in good faith in this matter the foregoing would not have occurred and matters would have priceeded in regular course. If she has any ground for avoidance of the inclosed release she will be at liberty to assert it in the Vermont Court of Chancery which alone has jurisdiction over this Vermont trust which includes real estate, paintings and art objects all located in Vermont and which, as far as I know, have not yet been secretly removed by Bender to New York, indeed it would seem difficult to abscond with the real estate as above.

A.C.A.

Exhibit C, to Complaint.

(See opposite ☛)

EXHIBIT "C"

ALBERT G. AVERY
70 PINE STREET
NEW YORK 5, N. Y.
WHITEHALL 3-0077

JAN 16 1963

January 15, 1963

General Electric Co.,
Treasury Operations Dept.,
Stock Transfer Operations,
570 Lexington Ave.,
New York 22, N.Y.

Attention of : KMS
Josephine G. Avery, Trustee u/d 9/12/21
100 shares General Electric Co.

Dear Sirs:

I have your letter of the 14th in reply to mine of the 7th and advising that on December 31, 1962 you transfered the above stock certificate(presented to you, I understand, by Robert E. Owens, Jr., a stranger to the above Avery family trust) into new certificates which you have delivered to Owens for 33 shares each in the names of Emilie B. Bender, Katharine M. Feuerlicht and myself and 1 share in the names of Bender and Feuerlicht as "successor trustees" of a trust that, as you know, terminated on the death of the last surviving life tenant and sole trustee, my Mother, Mrs. Josephine G.Avery, above named, at Rutland, Vt., on December 7, 1962, in whose name this 100 share certificate was registered on your books as noted.

Demand is hereby made upon you for the rescission and cancellation forthwith of all stock issued in the name of Emilie B. Bender in any capacity, as above, for the reclaimation of the above certificates in her name, totalling 34 shares, and for the issuance of new certificates for 17 shares each in the names of Mrs. Feuerlicht and myself so that the above trust holding is divisible 50 shares each equally between us as the sole vested remaindermen of the Avery Trust.

This is a Vermont Trust and does not become a "New York Trust", your counsel to the contrary notwithstanding, merely by virtue of the fact that the Bender woman at some unknown date after December 11, 1962 and while proceedings for the probate of the Trustee's will were pending in Vermont and the issuance of letters to her executor, George G. Smith, removed the above 100 share certificate(as well as bearer bonds totalling $91,500. par value) to New York. By the same token it would not become a "Brazilian trust"(where there is no extradition treaty) had she removed these securities to Brazil. The trust was created by deed dated September 12, 1921 executed by my parents, Brainard and Josehine G. Avery as trust settlors, then resident in New York, with The New York Trust Co., as trustee and then comprised securities physically located in New York. In 1937 the Trust Co., was succeeded by Bender as sole trustee and as "compensation" for her services as such trustee by an Amendment dated April 23, 1937 she was given a 1/3rd interest in the trust.

Thereafter and in November, 1939 the trust settlors and sole life beneficiaries, Brainard and Josephine Avery, permanently removed their home, business address, domicile and residence from New York to Middletown Springs, Vt., where they have ever since remained.* On November 28, 1939 Bender retired and sole trustee in favor of Josephine G. Avery, supra, and on November 29, 1939, in return for the approval of her administration as trustee over the period

* Brainard died there February 6, 1947

EXHIBIT C
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H1563

March 18, 1937-November 28, 1939 without the burden, delay and expense of the usual accounting(wherein possible surcharges might be developed) Bender expressly released any interest or claim that she had in this Trust (under the Amendment of April 23, 1937, supra) to "principal or income" A copy of this release is in my possession if you wish to see it. Presumably it was not disclosed to you by Owens, Bender's attorney, when he procured the stock transfers you mention on December 31, 1962. Chase Manhattan Bank, Transfer Agent for several of the other stocks in this trust, advises me it would not make such transfers if the existence of this release had been disclosed to it at the time.

The above demand for rescission, cancellation, etc., as well as for the delivery by Owens of the certificates already issued in the names of my sister and myself, is expressly made upon you pursuant to all of the grounds enumerated in Sec. 168 of the New York Personal Property Law(Sec. 7 of the Uniform Stock Transfer Act), namely: (a) the transfer was procured by fraud(concealment from you of existence of the release of November 29, 1939, supra); (b) it was secured under circumstances making indorsement and transfer and delivery of the stock to Owens inequitable; (c) the transfer was made without legal authority of the deceased registered owner, Josephine S. Avery, Trustee, or her personal representative, her executor, George S. Smith, Herald Bldg., Rutland, Vt.; (d) the transfer occurred subsequent to the death of such registered owner on December 7, 1962, of which you were put on notice by Owens, when, eo instante, legal title to this stock vested in the two trust remaindermen, Mrs. Katharine A. Feuerlicht, 510 East 23rd Street, New York 10, N.Y., and myself at the above address, with so-called "administrative title", for purposes of indorsement and delivery, vesting in the executor of the deceased Trustee and registered owner, George S. Smith.

I will agree that this involves the Avery Trust and not the Luckenbach estate, also that this is an inter vivos trust and not a testamentary trust in the New York Surrogate's Court, however the rule laid down in Matter of Luckenbach is merely the general rule applicable to all trusts throughout the United States and countries following the English rule in chancery and at common law. It is axiomatic that there can be no "successor trustees" after a trust has terminated on the death of the last life tenant or income beneficiary, whether it be an inter vivos or a testamentary trust; that no court or any one else has the power to extend a trust after it has terminated; that eo instante the trust remainder vested in the two trust remaindermen as stated with administrative title for the purpose of winding up continuing in the personal representative of the deceased trustee; that even if the trust remaindermen desire and procure the appointment of "successor trustees" there can be no such animal, since there is then no trust and such appointment will be vacated at the instance of the personal representative of the deceased trustee, her executor(See Friedley v. Security Trust & Safe Deposit Co., 10 Del Ch. 74, 84 A 303; 1 Perry: Trusts(3rd ed.) Sec. 264, p. 347; Hinds v. Hinds, 126 Me. 521, 140 A 189; 90 C.J.S. Trusts, Sec. 263, p. 207; Schenck v. Schenck's Exrs., 16 N.J.Eq. 174, citing Hill: Trustees, 175, Willis: Trustees, 53, Lewin: Trustees, 205; 54 Am. Jur. Trusts, Sec 99, p. 91; 1 Restatement: Trusts(2nd ed.) Sec. 107)

While there are no Vermont decisions on the precise point Vermont has a Court of Chancery which alone has jurisdiction of this trust(which contains real and personal property with its situs solely in Vermont). It consequently follows the law laid down in the leading chancery jurisdictions in this country, Delaware and New Jersey, as above set forth.

EXHIBIT "C"

Following the rule of the Luckenbach and Fricdley cases, supra, in New York are the Ziegler case, 125 N.Y.S(2) 341; Finck, 103 Misc. 526; Frech, 220 App. Div. 125, aff'd 246 N.Y. 552; Wiltse, 24 N(2) 398; Autor 3 N(2) 385; Phipps,1 A.D.(2) 695,697, which I suggest you ask your counsel to read. Trustees have no right to perform any act of administration of a trust after it terminates(Jones' Will, 206 N.Y. 107; Miller's Will, 257 N.Y. 349, 355).

Thus the indorsements you recognized by "successor trustees" of a non-existent trust long after it terminated are worthless and the stock delivered to a stranger pursuant thereto must be rescinded, cancelled and reclaimed by you for the reasons above set forth.

I omitted to note, supra, that in November, 1939 all the trust cash and securities were physically removed by Josephine G. Avery, Trustee, to Vermont from New York, thus there has been nothing in this trust in New York since then, except some bearer bond coupons cut by Bender in Vermont and removed by her to New York during the Trustee's last illness. Bender ignored two letters of October 23 and 26, 1962 instructing Bender, as her book keeper, to return these coupons forthwith, thereby creating great burdens on my Mother in her last illness, causing her to use up her savings and contributing greatly to her final anguish and worry.

The claim that this is a "New York trust" is the most specious of all, for the reasons above set forth.

On learning last week that Bender was seeking to have the trust stocks put in her name, as you have done with a portion, this whole matter was presented to the New York County District Attorney's Office and also the Criminal Chief of the Office of the U.S.District Attorney here, both concluding that the matter initially is one for civil litigation although the Criminal Chief, supra, observed that I had been "royally rooked", to use his language. And since bearer bonds and coupons are also involved, I have placed the whole matter with Messrs. Sullivan & Cromwell, 48 Wall [illegible] New York [illegible] 333 exclusive and burdensome for me to handle personally.

Awaiting your further advices, I am

Very truly yours,

Adelbert G. Avery

Exhibit D, to Complaint.

(See opposite ☛)

EXHIBIT "D"

ALBERT C. AVERY
70 PINE STREET
NEW YORK 5, N. Y.

January 16, 1963

W. K. Rieber, Assistant Treasurer,
The Chase Manhattan Bank,
1 Chase Manhattan Plaza,
New York 15, N.Y.

Josephine G. Avery, Trustee u/d 9/12/21
100 shares American Cyanamid Co.
105 " Chase Manhattan Bank
100 " Socony Mobil Oil Co., Inc.

Dear Mr. Rieber:

I have your letter of the 15th in reply to mine of the 7th. It is elementary law throughout the United States that there can be no "successor trustees" of a trust after it terminated, as this one did, with the death of the sole surviving life tenant and also the sole trust, Josephine G. Avery, on December 7, 1962 or nearly one month before you made the transfers of the above shares in question on January 2, 1963, according to your letter(Jones' Will, 306 N.Y. 107; Miller's Will, 257 N.Y. 359,355). No court or anyone else is empowered to extend a trust beyond its termination, of which you had notice at the time you made the transfers in question on the indorsements of non-existent "trustees" of a trust then long terminated(id.).

This was a Vermont trust with the income beneficiaries, trust settlors, sole trustee and all trust property domiciled and having its situs there at the time of the foregoing transfers. It included real and personal property situated in Vermont. While there are no Vermont decisions on the precise question the Vermont Court of Chancery follows the chancery practice in the leading chancery jurisdiction of Delaware laid down in the leading case in this country of Friedley v. Security Trust & Safe Deposit Co., 10 Del. Ch. 74, 84 A 833. This case holds that there can be no "successor trustees" of a trust after it terminates, that even if they are then appointed by the trust beneficiaries such appointment will be vacated at the instance of the personal representative of the deceased Trustee, in this instance her executor, George G. Smith, Herald Bldg., Rutland, Vt., under her will admitted to probate in the Rutland, Vt., Probate Court on January 4, 1963.

In New York this universal rule is recognized in the following cases: Luckenbach, 267 App. Div. 275, aff'd 292 N.Y. 675; Ziegler 125 N.Y.S(2) 341; Finck, 103 Misc. 526; Frech, 220 App. Div. 126, aff'd 246 N.Y. 552; Hilton, 24 M(2) 398; Astor, 2 M(2) 385 and Phime, 1 A.D.(2) 695. Indeed, as these cases show, following Luckenbach, since it eliminated any "successor trustees", the New York Surrogate's Court Act was amended to permit their appointment by Surrogates in testamentary trusts, nevertheless the Surrogates have since refused to make such wasteful appointments in the absence of a showing of need and necessity therefor, i.e., that the personal representative of the deceased trustee, her executor, was incompetent, unfit, etc.(id.)

EXHIBIT "D"

EXHIBIT "D"

The above rule generally will be found also in 1 Perry: Trusts (3rd ed.) Sec. 268, p. 347; Minda v. Minda, 126 Me. 521, 140 A. 189; 90 C.J.S. Trusts, Sec. 263, p.207; Schenck v. Schenck's Ex'r, 16 N.J.Eq. 174, citing Hill: Trustees, 175, Willis, Trustees, 53, Lewin: Trustees, 205; 54 Am. Jur. Sec. 99, p. 91; 1 Restatement: Trusts(2nd ed.) Sec. 104).

Shares of stock are not real property, there is no New York real property in this inter vivos trust and consequently Article 111 of the New York Real Property Law has no application to this matter, on its face and without discussing its contents.

Accordingly demand is hereby made upon you for the rescission and cancellation of all of the stock which you have transfered into the name of Emilie B. Bender, either individually or as "successor trustee", and for the reclaimation by you of any certificates so delivered, pursuant to Section 168 of the New York Personal Property Law(Sec. 7 of the Uniform Stock Transfer Act) on all of the grounds therein specified, viz.: (a) the transfer was procured by fraud(concealment from you of the inclosed release under seal of November 29, 1939 by Bender of any interest in this trust, "principal or income"; (b) it was secured under circumstances making the indorsement, transfer and delivery inequitable(while probate proceedings were pending for the appointment of the executor of the deceased trustee and registered owner, Josephine G. Avery); (c) the transfer was made without legal authority of the registered owner on your books, or her personal representative; (d) the transfer occurred nearly a month after the death of such owner on December 7, 1962, of which you had actual notice at the time, although, so instante, title to this stock then vested in equal shares in the two vested remaindermen of this trust, my sister, Mrs. Katharine A. Feuerlicht, 510 East 23rd Street, New York 10, N.Y., and myself, in equal shares, Bender having released her interest in this trust, as noted, "administrative title" for indorsement purposes, etc., then vesting in the executor of the deceased trustee.

It is schoolboy law that all documents are to be construed in accordance with the law and, if possible, to be upheld in harmony therewith. The Sixth Trust Amendment of November 28, 1939, to which you refer, was prepared by my Father, Brainard Avery, then of 40 years experience at the Bar. It appointed Josephine G. Avery sole Trustee in place of Bender to continue the trust for the lives of the two life tenants, Brainard and Josephine Avery, then alive and in being. It then provided(as you know):

> "* * * in event of the death of Josephine Gray Avery, the sole trustee, Emilie B. Bender and Katharine Avery Congeshall are hereby appointed trustees, said appointment to become effective of the day of Josephine's death."(K. Congeshall being now K. Feuerlicht).

Thus the only purpose, and the only possible lawful purpose, of this provision was to provide for trustees to continue the trust for the life of Brainard in event Josephine(then sole trustee) predeceased him, an event that did not occur since he died February 6, 1947 and she died, as noted, on December 7, 1962. Had the Amendment intended to appoint "liquidating trustees" or "agents" to wind up this trust after it terminated it would have plainly said so.

As appears from the inclosed release this Amendment was followed the next day by Bender's turning over the trust corpus to the new Trustee, Josephine

EXHIBIT "D"

securing a complete approval of her(Bender's) administration as trustee over the period March 18, 1937-November 28, 1939 without the burden, delay and expense of an accounting with possible surcharges thereon and, in return, Bender expressly waived(released) any claim that she had acquired in this Trust under the Fourth Amendment of April 23, 1937, giving her 1/3 thereof as compensation for her services as trustee, etc(See Avery v. Bender 126 A(2) 99 wherein Bender, for reasons best known to herself, suppressed the existence of this release). You will note the release is witnessed by the Trust settlor and beneficiary, Brainard Avery.

Over the period 1947-62 Bender acted as bookkeeper for the trustee, my mother. During the latter's last illness with cancer(at the age of 88) Bender secured from her a right of access to the trust safe deposit box at the Killington Office of the Vermont Bank & Trust Co., Rutland, Vt., for the sole and limited purpose of collecting bearer bond coupons in this trust to save the trustee that burden. Last fall, while the trustee was in the hospital, it was discovered that coupons for the calendar year 1963 and the rest of 1962 had been cut and removed to New York by Bender who thereafter ignored the trustee's two written demands of October 23 and 26, 1962 that they be returned forthwith to Vermont, thereby causing the trustee much distress, anguish and worry.

Following the trustee's death and funeral I attended the safe deposit box opening at Rutland for the purpose of removing the will for probate on December 11, 1962. At that time the box was observed by those present(including the Probate Judge) to be filled with the trust securities, presumably including the above stocks and some $91,800. in bearer bonds. The probate proceeding was commenced that day with a notice published in the paper on December 12th of the hearing on January 4th when the will was admitted without opposition appointing Mr. Smith as executor.

Subsequent to my letter to you of the 7th I was notified by Smith that the box had been cleaned out at some unspecified date after December 11, 1962. Concurrently I was congratulated by some companies here on becoming a stockholder and on making inquiry found that Bender's attorney, Robert W. Owens, Jr., 20 Exchange Place, New York 5, N.Y., had been peddling these stocks among the Transfer Agents here, presumably not disclosing the law and facts above set forth (1) as regards "successor trustees" or (2) the release of his client of November 29, 1939 to any interest in this family trust.

The inclosed photocopy of this document is made from a carbon copy of the original, conformed and delivered to me by Bender herself and the signatures thereon and copy of the seal are in her own handwriting. Presumably the original has now been removed from the trust safe deposit box as aforesaid,

I have presented the foregoing to the New York County District Attorney's Office and the Criminal Division of the U.S.Attorney's Office, both of which have concluded the matter is a civil one in the first instance although commenting that I have been "royally rooked", to use their term. And since bearer bonds and coupons are involved I have retained Messrs. Sullivan & Cromwell, 48 Wall Street, New York 5, N.Y.(Messrs. Ess and Potter) for appropriate civil action.

EXHIBIT "D"

In discussing this distressing situation informally over the phone with one of your officials the latter advised he was certain that Chase Manhattan would not have transfered any stock to Bender had it known at the time of the existence of her release. On January 10th her attorney Owens tendered me a fraction of the above shares if I would execute in advance a document recognising her right to 1/3 thereof, however he did not even tender me 1/3, holding out part of the trust, presumably for his own "fees". The New York District Attorney's Office takes a very dim view of this.

Whether the stock should have been indorsed by Smith as executor may now be academic as to the certificates you have made out to my sister and myself, however Owens even has possession of these. I am certain that Chase Manhattan does not wish to compound this distressing situation and that on a review of the foregoing you will rescind the unlawful transfers made into the name of Emilie B. Bender, either individually or as "successor trustee."

Awaiting your prompt advices, I am

Very truly yours,

1 Incl a/s

P.S. I should perhaps add the obvious fact that Avery v. Bender, supra, determinaed nothing more than that Bender, in 1937 by an amendment admittedly made without the knowledge or consent of the trust remaindermen, validly acquired a 1/3 interest in this trust. She was, of course, fully competent to release this interest nearly three years later on November 29, 1939 and did so, as noted. This release was not disclosed in the litigation Avery v. Bender which, as appears from the decision, was solely an action for a declaratory judgment as to the legal effect of the Fourth Amendment of April 23, 1937 that was submitted upon an agreed statement of facts.

A.G.A.

Exhibit E, to Complaint.

(See opposite ☛)

EXHIBIT "E"

ALBERT G. AVERY
70 PINE STREET
NEW YORK 5, N. Y.
WHITEHALL 3-0077

January 16, 1963

Morgan Guaranty Trust Co., of N.Y.,
30 West Broadway,
New York 15, N.Y.

Attention of Mr. C. C. Cahill
Josephine G. Avery, Trustee u/d 9/12/21
100 shares Standard Oil Co. of N.J.

Dear Mr. Cahill:

Replying to your letter of the 18th inclosing photo-copy of worthless "stock power" executed December 27, 1962 by alleged "successor trustees under Agreement dated September 12, 1921" pursuant to which you have allegedly transfered the above stock from the above registered fiduciary owner: 33 shares into the names of Emilie B. Bender, Katharine A. Feuerlicht and myself each and 1 share into the names of said purported "succes or trustee", said "successor trustees" were not and are not the "proper parties do(sic.) direct such a transfer" as stated in your letter, for the following reasons:

1. There are no "successor trustees" contemplated or provided in the trust deed(agreement of September 12, 1921 supra) which provides that on the death of the last surviving life beneficiary(Brainard Avery and his wife, Josephine) the trust shall "vest" equally in the surviving children of the trust settlors, Katharine A. Feuerlicht and myself (a third child, Brainard Jr., having died at the age of 15 in 1926). See Avery v. Bender, 119 Vt. 313, 126 A(2) 99 wherein the trust deed is reproduced verbatim, if you do not have a copy.

2. While a Sixth Amendment, dated November 28, 1939(reproduced in Avery v. Bender, supra verbatim) appointed Josephine G. Avery sole trustee of this trust(the registered owner of the above stock on your books) and also appointed successor "trustees" to continue the trust(for the life of Brainard Avery) on the death of Josephine, the then "sole trustee", such appointment, on its face, was effective only in event Josephine predeceased Brainard and was to continue the trust for his remaining lifetime, an event that did not occur since he died in Vermont on February 6, 1947 and she died there on December 7, 1962(Avery v. Bender supra).

3. It is elementary that all instruments are to be given a lawful construction, if possible, rather than an illegal one. And the law is plainly settled that there can be no "successor trustees" of a trust after it has terminated, that even if such trustees are nominated and appointed by the trust beneficiaries(not the case here) such appointment will be vacated at the instance of the personal representative of the deceased trustee (Josephine G. Avery, registered owner of the above stock) since he alone has the duty of winding up and distributing the trust corpus to the remaindermen entitled thereto(Friedley v. Security Trust & Safe Deposit Co., 10 Del.Ch. 74, 84 Atl, 833 and cases cited). This was a Vermont trust where the corpus, settlors, sole trustee and life beneficiaries alone had

EXHIBIT E
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1/18/63

their situs, residence and domicile(Avery v. Bender,supra) and the trust includes real and personal property situated there and nowhere else. Vermont has a Court of Chancery which follows Delaware, the leading chancery jurisdiction in the United States, however the rule is the same in New York(Matter of Luckenbach, 267 App. Div. 275, affirmed in 292 N.Y. 675 at the instance of Owens, draftsman and witness to the worthless "stock power" of December 27, 1932 supra). See also: Ziegler, 125 N.Y.S.(2) 341; Finch, 103 N.Y.Misc. 526; Frech, 220 App. Div. 126, aff'd 246 N.Y. 552; Wiltse, 2n N(2) 385; Phipps, 1 A.D.(2) 695. Indeed, following the Luckenbach decision, since it eliminated alleged "successor trustees",in accordance with settled law, after a trust has terminated, the New York Surrogate's Court Act was amended to authorize such appointments, in the case of testamentary trusts(as a source of patronage) however, as the above cases establish, even then Courts refuse to make such appointments in the absence of a showing of a "necessity" therefor, i.e., that the personal representative of the deceased trustee(her executor or administrator) is incompetent, unfit, etc., a situation not involved here.

4. Thus it is plain that as Transfer Agent you had no right to recognize the indorsement of stock power of "Successor Trustees under Agreement dated September 12, 1921" for the reasons: (a) no such "Trustees" are even provided for in that Agreement(as you must have observed if you read it); (b) if such appointment is urged under the Amendment of November 28, 1939 (although not so stated in the bogus "stock power") it is illegal, nugatory and void for the reasons above set forth, in both New York and Vermont.

5. Counsel will advise you that the inclosed release of November 29, 1939 by Bender to any interest in this trust, "principal or income",means what it says. As appears from Avery v. Bender, supra, by a Fourth Amendment dated April 23, 1937 Bender was given a 1/3 interest in this trust on its termination(if she was then alive and single, as she is) and this amendment was upheld in that litigation, although it took 1/3 of the trust from the "vested" remaindermen without their knowledge and consent, contrary to what is generally understood to be New York case and statute law. Counsel will further advise you that having validly acquired such interest in 1937 Bender was thereafter competent to release in two years and seven months later, on November 29, 1939 by a release under seal and that she did so, as per the inclosed. Avery v. Bender did not involve this question and, for reasons best known to herself, Bender did not see fit to disclose the existence of her release in that litigation which involved solely the 1937 amendment giving her 1/3 supra.

6. Over the period March 1, 1939-November 28, 1939 Bender was trustee of this trust, receiving in return the Fourth Amendment of April 23, 1937 as "compensation" for her services, as trustee, etc(Avery v. Bender). In 1939 the trust settlors and income beneficiaries, Brainard and Josephine Avery, removed to Vermont from New York, Josephine became sole trustee on November 28, 1939, the trust corpus was removed to the aforementioned trust safe deposit box in Vermont, Bender retired as trustee and,in return for an approval of her administration as trustee over 1937-39 and a waiver of any accounting by her as trustee she executed and delivered the aforesaid release. Counsel will advise you that this is a very good and valuable consideration, also that a "waiver" under New York law need no have consideration; that, construed as a "release" the addition of a seal dispenses with consideration in the common law jurisdiction of Vermont where the release was prepared by Brainard Avery(an attorney of 40 years experience in 1939), executed and sealed by Bender and witnessed by Brainard Avery, a trust settlor and life beneficiary.

EXHIBIT "E"

7. The inclosed photocopy was made from an office carbon copy of the original release, conformed and delivered to me by Bender herself. The original presumably was placed in the trust safe deposit box in Vermont which, as stated in my letter of the 10th, was secretly cleaned out at some unknown date between December 11th and 27th(when the bogus "stock power" was executed and presented to you), presumably by Bender who had a key thereto in the trustee's lifetime as her book keeper solely for the purpose of cutting bond coupons(~91,800. in bearer bonds have disappeared) during the trustee's last illness with cancer at the age of 88.

8. Presumably you are a member of the Stock Transfer Association and hence familiar with its Rules for the implementation of the Act for the Simplification of Fiduciary Transfers(N.Y.Gen. Bus. Law, Sec. 359-p). Under Rule VII(2) where, as here, the stock is registered with you in the name of a fiduciary(Josephine C. Avery, trustee, etc.) the Transfer Agent must require a certificate from a bank or broker not over 60 days old as to the authority of the fiduciary seeking to make the transfer (in this case not the registered owner at all), plus "evidence" that the situs of the trust is in a state having an "acceptable statute", defined in Rules II and VI as either the Model Fiduciary Act(in force only in Delaware),or Article 8 of the Uniform Commercial Code or the Act for the Simplification of Fiduciary Transfers. None of these Acts was ever been in force in Vermont where this trust has had its only situs for over 23 years, as noted(it also includes Vermont real and personal property), consequently such "evidence" was never furnished you when you consummated such illegal transfer, nor could it be.

I hereby accordingly repeat and renew my demand for the rescission and cancellation of all transfer into the name of Emilie B. Bender, individually or as a nonexistent "successor trustee", as per my letter of January 10th(p. 1) and request that you procure the return and delivery from Owens of the certificate for 33 shares in my name that you gave him unlawfully on December 27, 1952 and issue further certificates for 17 shares each in the names of my sister and myself, sending them to the addresses indicated and dividing the above 100 share trust certificate into 50 shares to each of us. Consolidated Edison Co., of N.Y., today advises it has placed a "stop" on the split up similiarly attempted by Owens and Bender of 100 trust shares in that company, I shall expect Morgan Guaranty to do likewise.

Since bearer bonds are involved, as noted, also in the foregoing swindle I have placed the matter in the hands of Sullivan & Cromwell, 48 Wall Street(Henry M. Ess III, Esq.), for appropriate civil action in the first instance, as per the recommendations of the state and federal District Attorney offices here.

Awaiting your further advices, I am

Very truly yours,

1 Incl e/s

Exhibit F, to Complaint.

(See opposite ☛)

EXHIBIT "F"

ALBERT G. AVERY
70 PINE STREET
NEW YORK 5, N. Y.
WHITEHALL 3-0077

January 21, 1963

American Telephone & Telegraph Co.,
195 Broadway,
New York, N.Y.

Stock Transfer Dept.
Josephine G. Avery, Trustee u/d/ 9/12/21
180 shares American Tel & Tel

Dear Sirs:

I note that alone of the 10 Transfer Agents involved in this Trust you have not yet replied to my letter of the 7th advising you that the above Trust terminated on December 7, 1962 on the death of the above named as the sole surviving life beneficiary and Trustee, that under the law in this country(Friedley v. Security Tr. & Safe Dep. Co., 10 Del Ch. 74, 84 Atl. 353; Matter of Luckenbach, 267 App. Div. 275, aff'd 292 N.Y. 575 and cases cited) there can be no such thing as "successor trustees" of a trust after it has terminated; that under this law the duty of winding up and distributing the trust corpus devolves upon the personal representative of the deceased Trustee and no one else; that one Robert W. Owens, Jr., attorney for Emilie B. Bender, had been presenting stock certificates in the above Avery family trust and standing on your books in the name of the above Trustee for transfer with 1/3 into Bender's individual name, having concealed from the Transfer Agents involved that Bender, for a valuable consideration, released under seal any interest that she had in this Trust to either "principal or income", as per photocopy inclosed, made from a carbon copy of the original release, conformed by Bender herself and delivered to me some years ago. In some instances transfers have been made in ignorance of the foregoing; in others Transfer Agents have advised me they have issued stop orders pursuant to the Act for the Simplification of Fiduciary Transfers, presumably known to you; in others the matter has been refered to counsel.

On January 19th I received photocopy of an alleged "stock power" prepared and witnessed by Owens, dated December 27, 1962 and signed by alleged "Successor Trustees under Agreement dated September 12, 1921," the Trust Deed of the above Avery family Trust. If you will examine the same(reproduced verbatim in Avery v. Bender, 119 Vt. 313, 126 A(2) 99, if you do not have a copy) you will note that nothing is said therein about "Successor Trustees" and the signatories to such bogus stock power do not profess to act under any other authority. It is, therefore worthless. Moreover, since this is a Vermont trust with the income beneficiaries, trustee, and trust corpus all domiciled and situated there and nowhere else, under the Rules of the Stock Transfer Association, as amended to November 1, 1962, with which you presumably are familiar(Rules II, VI and VII(2)) the Act for the Simplification of of Fiduciary Transfers(which one Agent has urged in exculpation) is not applicable since no "evidence" was ever furnished you that any "suitable statute" as defined in said Rules is in force in Vermont, nor could it be since the Model Fiduciary Act, Article 8 of the Uniform Commercial Code and the Act for the Simplification of Fiduciary Transfers, none of them, are in force in Vermont where this Trust has its situs, as required by

EXHIBIT F

EXHIBIT "F"

Rule VII(2) of the above Rules.

The inclosed release under seal means, of course, what it says and was executed and delivered in Vermont where seals dispense with proof of consideration, although there was in fact abundant consideration for it., i.e., approval of Bender's administration as the retiring Trustee, over the period March 13, 1937-November 23, 1939 and a waiver of the burden, expense and delay(to say nothing of possible surcharges) to Bender on the customary accounting of a retiring Trustee. See Avery v. Bender, supra, holding that Bender acquired a 1/3 interest in this Trust by Fourth Amendment on April 23, 1937 as "compensation" for services as such Trustee, etc., which, she was, of course, competent to waive "expressly", i.e., release, two years and seven months later and did so. For reasons best known to herself this release was not disclosed by Bender in that litigation, hence it did not determine the same.

And although the bogus stock power, supra, does not so recite, there were "trustees" appointed by a Sixth Amendment of November 28, 1939 in event of the death of the then "sole trustee", Josephine Avery. Obviously the purpose of this Amendment, and the only possible lawful purpose under the law above set forth, was to provide trustees to administer the Trust for the life of Brainard Avery in the sole event that the then Trustee(Josephine) predeceased him, an event that did not occur since he died in Vermont February 6, 1947 and she did so, as noted on December 7, 1962(See Avery v. Bender, supra). This Amendment did not appoint "successor" trustees to "liquidate" this Trust after it had terminated and when title had vested equally in the two trust remaindermen, Katharine A. Feuerlicht and myself, surviving children of the two trust settlors, Bender having released any claim thereto in 1939 as noted.

In event you have already transfered 1/3 of the above stock or 60 shares, pursuant to such or similar power of attorney by "Successor Trustees under Agreement dated September 12, 1921", or otherwise, demand is hereby made pursuant to Sec. 168 of the N.Y. General Business Law(Sec. 7 of the Uniform Stock Transfer Act) for a rescission and cancellation of such transfer and the issuance and delivery of certificates for 1/2 or 90 shares each to the vested remaindermen of this Trust, Mrs. Katharine A. Feuerlicht, 510 East 23rd Street, New York 10, N.Y., and myself at the address above indicated. This demand is on all of the grounds set forth in said Section: (a) the transfer was procured by fraud(suppression of the foregoing release and law above set forth); (b) it was secured under circumstances making indorsement and delivery inequitable; (c) it was made without legal authority of the deceased registered owner or her personal representative; (d) it occurred after the death of such owner on December 7, 1962. The injured party(myself) has not elected to waive the injury, nor am I guilty of laches, having notified you in writing on January 7, 1963, the very day I was put on notice by Consolidated Edison Co., of what had happened, or was being attempted. Since then I have learned that the trust safe deposit box at the Killington Office of the Vermont Bank & Trust Co., Rutland, Vt., was at some unknown dated between December 11(when opened in my presence for the sole purpose of removing the Trustee's Will for probate on January 4th) and December 27th(when the bogus stock power supra was pre-

sented supra) was cleaned out in its entirety of $158,000. of securities (market value) including $91,200. in bearer bonds(par value). I have had the matter up with the Offices of the state and federal District Attorneys who feel civil action is required in the first instance and have accordingly retained Messrs. Sullivan & Cromwell, 48 Wall Street, New York 5, N.Y.(Henry W. Ess III).

I am certain that American Telephone & Telegraph Co., does not wish to compound this distressing situation and will accordingly thank you to advise me promptly in the matter, as the other Transfer Agents in question have done.

Very truly yours,

1 Incl a/s

Exhibit G, to Complaint.

(See opposite ☛)

and I naturally wish to preserve it intact. When the Trust dispute is settled it should be easily possible to do so out of Trust income.

I do not know of any other income my Mother had except from the Trust which ceased on her death, thus the estate 1963 income, if any, could be below the $600. minimum. It would, however be desirable for you to file state and federal returns for 1963 setting forth this fact and exonerating you from any income tax liability as Administrator. It is more important, if anything, to file a return that; to file a correct one in all respects. As previously mentioned there is an insurance refund you should collect from Fred Field & Son, Rutland, for property damage last October which my Mother paid for.

Trust

As stated on the 18th, in 1921 my parents by joint deed established a living or inter vivos trust, as a form of saving, with the New York Trust Co., here as trustee, income to my parents or the survivor and on death of the latter the trust terminated and became equally divisible between their then surviving children, my sister and myself. In those years and down to 193809 all concerned were in New York City where the trust(consisting then only of cash and securities) was located.

In March, 1937 the Trust Co., wished to resign as trustee because of heavy losses in the trust during the depression(for which it might ultimately be accountable to my sister and myself as the remaindermen). Hence it was agreed between my father and his secretary, Bender, that she would become trustee, receiving in return as compensation 1/3 of the trust income, effective on my father's death, and 1/3 of the principal(remaindor) on termination of thectrust, provided she was then alive and single. This was the so-called Fourth Amendment of April 23, 1937 made without the knowledge or consent of my sister or myself although, as you can see, its effect was to take 1/3 of the remainder from us.

By November, 1939 my father had retired, closing his office and apartment in New York, and he and my Mother had moved permanently to Vermont, Bender coming with him for a time as his secretary to help him wind up various unfinished matters. By November, 1939 all these were concluded, there was nothing to employ Bender on further and she returned to New York to enter her present permanent employment in a law firm here that my father secured for her. Accordingly it was agreed: (1) that Bender would retire as trustee and turn over the trust to my Mother as sole trustee; (2) that in return for an approval of her administration as trustee(over the period March 18, 1937-November 28, 1939) without the heavy burden, delay and expense of an accounting(as well as possible liability thereon for further losses in the trust during this period) Bender would release any claim that she had to trust "principal or income" under the Fourth Amendment; (3) that the trust would be removed to Vermont and thereafter be a wholly Vermont trust.

This was accomplished, my Mother became trustee on November 28, 1939, Bender executed her release with my father as a witness on November, 29, 1939, my Mother went to New York and removed the securities and cash to Vermont, Bender entered her new job in New York and my parents then went south for the winter. At that time the trust consisted almost wholly of defaulted foreign bonds(German and Italian), World War II had been de-

clared in September, 1939, the bonds had been in default since the early 1930s and there was not even a market for them. Thus Bender was glad to get out and have her administration approved in return for her release of a possible future interest in the trust which then had only a nominal value, if any. The original release was apparently put by Bender in the trust safe deposit box at Rutland, along with the other trust documents. Its meaning and effect were never explained to my Mother.

Thereafter and until my father's death on February 6, 1947 Bender did the trust bookkeeping for which she has paid on a time spent basis. These items were very nominal, only a few dollars a year as the trust was then dormant, as noted, and worth very little.

Following my father's death and my own return from Germany in late 1949 Bender dug out the Fourth Amendment and thereafter, instead of billing my Mother as trustee for bookkeeping services on a time spent basis, arbitrarily took down 1/3 of all the income under the Fourth Amendment. In the beginning this seriously impoverished my Mother with the result that by 1954 I determined to have a show down on the legal effect of the Fourth Amendment and brought an action in the Vermont Court of Chancery, claiming it was void as not consented to by my sister and myself, although it took 1/3 of the trust from us, as noted. In 1955 I won 100% in the Chancery Court (Shangraw, Chancellor) and a decree was made completely ousting Bender from the trust. The case was submitted on an Agreed Statement of Facts, consisting of copies of the Trust Deed and Amendments made by Bender or her attorney, Lawrence, from the originals in the safe deposit box at Rutland. Presumably the 1939 release was in the box at that time, however it was not brought forth, for obvious reasons, by them. Any trust company in Vermont would have performed thesame services that Bender was rendering the trustee for 4% of income, not 33 and 1/3%.

In 1956, on appeal, the Vermont Supreme Court reversed, holding the Fourth Amendment was valid and that the consents of my sister and myself thereto were not required. This is all that was held in that decree. Obviously rights acquired under the Fourth Amendment in 1937 could thereafter be released in 1939. That was what was done here.

Over the years 1952-62 the Trust increased very substantially in value due to redemption of all the foreign bonds with accrued interest, the rise in the stock market and large collections I was able to effect for the trust on old accounts due it. In his lifetime my father had borrowed heavily from the trust, consequently on hisxdeath the Probate Court found he owed it over $110,000., his estate was insolvent and all of it, after payment of expenses, was decreed to the trust on September 1, 1951, hence the trust acquired the library contents and Montvert property which Bender has not yet removed from Vermont.

To "justify" her 1/3 of the income as bookkeeper Bender kept elaborate records regarding each deposit and expenditure for my Mother who did not even understand how to keep her own check book. To facilitate the collection of the large amount of bearer bond coupons in the trust my Mother gave Bender a right of access to the trust box. In September, 1962, knowing that the end was near and my Mother was in the hospital, Bender came to Rutland and removed all the remaining 1962 bond coupons and also all for 1963.

Thereafter Bender ignored two instructions from my Mother as trustee, dated October 23 and 26, 1962, to return these coupons forthwith. My Mother needed them badly for her expenses of her illness, which were very heavy, Bender's action compelled her to use up her savings(as you know), should anything happen to Bender the coupons were the equivalent of cash and recoverable only with great difficulty as trust property in Vermont, etc. All this contributed greatly to my Mother's worry in her last days. Even before the will was probated, as you know, at some date in December Bender went to Rutland and removed all the securities and cash to New York, without notice to Smith the executor, or myself. On January 10, 1963 her New York attorney, Robert W. Owens, Jr., offered me something less than 1/3rd of the securities back if I would first sign a receipt recognizing Bender's right to 1/3rd which I, of course, refused to do in the light of her 1939 release.

The trust had blocks of stock in 10 companies whose transfer agents were located here, however transfers of 1/3 of the stock to Bender had been consumated in December before I learned what had happened, all except in the case of Consolidated Edison of N.Y., which has frozen the stock pending axdetermination of the 1939 release which, of course, was not disclosed by Owens and Bender in procuring the transfers in question. If any of the bearer bonds or coupons have disappeared she will, of course, be accountable. The state and federal District Attorneys here expressed the opinion I had been "royally rooked" but declined to prosecute criminally in the first instance since legal questions are involved as regards the 1939 release. This is the litigation that Dick is instituting in the Vermont Court of Chancery this month. The question is a simple one.

Hallo, Chief of the Criminal Division of the U.S.Attorney's Office here also expressed the view, on a full review of the facts, that you, as the personal representative of my Mother's estate, had a right of recovery from Bender of all the income she has taken down since February 6, 1947 as a result of her suppression and concealment of her 1939 release and its legal effect from my Mother. That can be worked out in due course. The amount involved is substantial.

Under 14 VSA Sec. 963 as Special Administrator you have all the statutory powers of an Executor or an Administrator C.T.A., to "collect assets, bring suits, sell the personal estate as the Probate Court orders and to apply to the Probate Court for the appointment of Commissioners to allow claims." Thus except for finally winding up the estate there is no difference in powers between a Special Administrator and one that is C.T.A.

It is the universal law throughout the United States and England (from whence our trust law came) that on the death of a trustee her personal representative(executor or administrator) is charged with the duty of winding up and distributing the trust of which she was trustee in cases where, as here, the trust has also then terminated. In other words, while legal title to the entire trust vested in my sister and myself on December 7, 1962 what is called "administrative title"(transfering stock, cash, personal property, etc.) then vested in the personal representative of the deceased trustee. This was, of course, well known to my father who in 1939 had been a lawyer for over 40 years as well as a former professor of law in Washington, D.C.

EXHIBIT "G"

The Sixth Amendment of November 28, 1939, removing Bender as trustee and appointing my Mother as successor, was prepared by my father in Vermont one day, as noted, before the release of November 29th. At that time the two life tenants or income beneficiaries of the trust were my father and Mother, she enjoyed frail health, his health was then excellent and it was generally understood in the family that she might predecease him. As she was then trustee also, in that event there would, obviously, have to be a new trustee to continue the trust for the lifetime thereafter of my father.

Consequently the Sixth Amendment provided that "in event of the death of the trustee"(Josephine Avery), Bender and my sister were appointed "trustees." The only possible or lawful purpose of this provision was to provide trustees to continue the trust for the lifetime of Brainard Avery—for there can be no "trustees" of a trust after it has terminated on the deaths of all the life beneficiaries.

In New York this law was reaffirmed by Bender's attorney Owens himself in Matter of Luckenbach, since widely followed. It is also the law elsewhere, as noted. There is none to the contrary. Notwithstanding, Bender, claiming to be a "successor trustee" took possession of the box in December, 1962 and removed the cash and securities to New York. Bank clerks, stock transfer clerks, etc., did not stop to consider this rule of law which is self-apparent to anyone who reflects upon it. When a trust ends there can thereafter obviously be no "successor trustees." When a monarchy is terminated and a democracy established there is no longer any "king", by the same token.

That is all there is to it, except the question of your own duty as representative of the estate under 14 VSA Sec. 963, supra. Under the law the Chancery Court can compel you to perform your duty in collecting from Bender the money she has stolen from your decedent's estate and in resisting any claims by anyone to being "successor trustee" of this non-existent trust; also in distributing the real and personal property in the trust among those held to be entitled thereto. Or, in cases where the personal representative(executor or administrator) refuses to act, the estate beneficiaries whom he represents can do so on his default, alleging his refusal or inability to act and joining him as a nominal defendant, in order that the estate and trust will be bound by the decree since his status is that of a stakeholder working in the interest of the beneficiaries of the estate he represents.

Fortunately the situation is very simple here since both the estate and trust are equally divisible between my sister and myself, there are no creditors or legatees of the estate to be considered and any recovery by the Estate from Bender(for losses she inflicted on Josephine Avery in diversion of the latter's income) would be divisible equally between us exactly as will be recoveries of losses inflicted by Bender on the Trust(of which there were many) and which resulted in diminution of the trust principal(also called the trust corpus or remainder).

The Probate Court has no jurisdiction over living or inter vivos trusts(fortunately) or of their trustees, those being matters solely within the Vermont Court of Chancery(the Superior or County Court Judge sitting as Chancellor and without a jury). The Probate Court does have statutory jurisdiction over testamentary trusts, created by wills, not involved here.

EXHIBIT "G"

Normally one of the chief duties of the personal representative of a deceased trustee is to submit an accounting of her administration, however this is not necessary here since Bender kept very detailed accountings of trust principal and income on monthly statements sent my Mother as Trustee which are bound in a book for the period February 6, 1947-September 1, 1962. For the period September 1-December 7, 1962 these sheets went to my Mother at the hospital where they were taken over by my sister who has advised she would send them to you.

Please secure these sheets from my sister(if you have not already done so) and send them to me, or copies thereof, in order that the book may be completed, thus relieving you of any burden of preparing an accounting for the deceased Trustee.

These sheets are prepared by Bender, hence she is bound thereby. Among other things they show: that Bender charged all taxes, insurance and other carrying charges on the real and personal property in Vermont to principal, thereby increasing the trust income of which she took down 1/3; that she likewise charged the fees of her own attorney, Owens, to trust principal on her own personal matters although this was not a trust charge at all; that when the foreign bonds were redeemed by issuance of new bonds for both the principal and interest arrears(going back to 1930) Bender treated the recovery as "income" and took down 1/3 thereof in the face of Treasury Department Rulings that no income or capital gain resulted, only a partial recovery of a total loss.

My sister informs me that the charge of taxes, etc., to principal instead of to income was done by Bender in a fit of pique when I refused to permit the sale of the Vermont real and personal property. There,it is of course, no justification whatsoever for the above.

While technically the estate of the deceased Trustee is also liable for these derelictions(although she acted on Bender's advice and instruction) any recovery thereon from the estate would be at the expense of my sister and myself as its beneficiaries in equal shares for our benefit as equal owners of the trust remainder. Thus it would be merely taking it from one pocket and putting it in another and would be pointless, aside from the fact, of course, that I would not proceed against my own Mother's estate. She was without business or legal training or knowledge and invariably did as directed by Bender who even wrote out the checks for her to sign and withheld her own for 2/3rd of the trust income until she gave Bender 1/3—the most unconscionable and grasping thing in my experience.

If Bender and Owens were on the level they would, of course, have disclosed existence of the 1939 release during the prior 1955-56 litigation(as it was undoubtedly then in the safe deposit box to which Bender had access); also they would have awaited the orderly probate of the will and a determinition of the validity of the release and the fakeclaim to becoming a "successor trustee" in the Vermont courts(since this is a Vermont trust with property still located there) instead of sneaking off all they could carry to New York in the great December bank robbery and then offering me a portion of my own property if I would drop all claims. There is an oil royalty in the Trust, also annual payments on an award from Washington which have been frozen until these questions are determined.

Sincerely yours,

Answer.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

[SAME TITLE]

Defendant, Albert G. Avery, answering the complaint by his attorneys, Sullivan & Cromwell, alleges:

IN ANSWER TO PLAINTIFF'S ALLEGED "FIRST CAUSE OF ACTION"

1. On information and belief, defendant admits the allegations set forth in paragraphs numbered "1", "2", and "3" of the complaint.

2. On information and belief, defendant denies the allegation in paragraph "4" of the complaint that Emilie B. Bender and Katherine A. Feuerlicht were "from and after December, 1962" "trustees" of the *inter vivos* trust described in the complaint, and, except as denied, admits on information and belief the remaining allegations in paragraph "4" of the complaint. Defendant alleges that the claim of Miss Bender and Mrs. Feuerlicht that they are successor trustees of said trust is the subject matter of presently pending litigation in Chancery, Rutland County, State of Vermont, and in the Supreme Court, State of New York, County of New York.

3. On information and belief, defendant admits the allegations set forth in paragraphs numbered "5", "6", "7", "8", and "9" of the complaint.

4. On information and belief, defendant denies the allegations in paragraph "10" of the complaint and begs leave

to refer to the exact terms and conditions of the Fourth Amendment.

5. Defendant admits the allegations of paragraph "11" of the complaint and alleges that the Sixth Amendment was prepared by the trust settlor Brainard Avery, then of about forty years standing at the Bars of New York and Vermont; that, on information and belief, the sole purpose of the said Sixth Amendment was to provide for trustees to continue to administer said trust for the benefit of the life tenant, said Brainard Avery, "in the event" that the then sole trustee, Josephine G. Avery, his wife, should predecease him, an event that did not occur, he dying thereafter in 1947 and she dying in 1962.

6. On information and belief, defendant admits the allegations set forth in paragraph numbered "12" of the complaint.

7. Defendant admits the allegations of paragraph "13" of the complaint and alleges that the instrument executed and delivered by Miss Bender in Vermont on November 29, 1939 was and is a general release under seal executed by her individually and as a release of her personal and individual claims to trust "principal or income" under the said Fourth Amendment of April 23, 1937; that said release was never thereafter modified, cancelled, rescinded or set aside and is now in full force and effect; that on or about the same date said Bender personally delivered the release to the sole trustee, Josephine G. Avery; that thereafter and on December 12, 1947, said Bender personally delivered to defendant, as a vested remainderman of said trust, a duplicate original of said release, bearing her scroll seal and signature; and that defendant has since rightfully relied on said release in the protection of his remainder interest in said trust; that in addition to said

seal such release was supported by a good and valuable consideration in fact and law. Defendant further alleges that the claim of Miss Bender that the November 29, 1939 document does not constitute a release of her individual interest in the trust income and principal is a subject matter in the presently pending litigations referred to in paragraph 2 hereof.

8. On information and belief, defendant admits the allegations set forth in paragraphs numbered "14", "15" and "16" of the complaint.

9. On information and belief, defendant denies the allegations of paragraphs "17" and "18" of the complaint and alleges that the trust safe deposit box therein referred to contained solely property of the said trust and personal property of said Josephine G. Avery, including her will and title deeds, that it contained no property of Emilie B. Bender or Katherine A. Feuerlicht, that the rental thereof was paid solely by Josephine G. Avery as such sole trustee and that Bender at all times after her removal as sole trustee on November 28, 1939 and her subsequent employment by Josephine G. Avery, trustee, as trust bookkeeper, by letter dated November 29, 1939, a copy of which is annexed hereto marked Exhibit "A" and made a part of this answer, had no right to possession, title or control over the contents of said safe deposit box, including bearer bonds and stocks, oil royalties and an award registered solely in the name of Josephine G. Avery as trustee, as well as personal papers of said trustee, except that as such bookkeeper said Bender paid an annual visit to the trust safe deposit box for the sole purpose of cutting the bond coupons therein and depositing them in the trustee's bank account at the Vermont Bank & Trust Co., Rutland, Vt., where such box was situated.

Answer.

10. On information and belief, defendant admits the allegations contained in paragraphs numbered "19" and "20" of the complaint.

11. Defendant denies the allegations of paragraph "21" of the complaint, except that defendant admits receipt of a paper which was a purported qualification by said Bender as a "successor trustee", and alleges that the trust agreement does not provide for successor trustees after the termination of the trust, and as a consequence, alleges that the sole lawful right of accounting, liquidation, winding up and distribution to the said vested remaindermen, including this defendant, thereupon passed by operation of law to the personal representative in Vermont of the estate of the deceased trustee and to no one else.

12. On information and belief, defendant admits the allegations of paragraphs "22" and "23" of the complaint and alleges that the entry of plaintiff into said trust safe deposit box on December 24, 1962 and his removal of the trust securities therefrom and from the jurisdiction of the State of Vermont, where the will of the said deceased trustee was then pending probate, as were proceedings for the appointment of a representative of her estate, was improper and illegal; that in addition to said securities, plaintiff caused to be removed from Vermont cash on deposit at said bank in the name of Josephine G. Avery, trustee, amounting, on information and belief, to in excess of $1,000, for which plaintiff has given defendant no accounting or tender of any portion thereof, together with all coupons on $91,800 par value of bearer bonds that have matured since said trust terminated on December 7, 1962 which have been similarly retained; that in addition to said assets the trust contained a valuable

gallery of paintings and art objects in Vermont as well as a forest preserve and furnished lodge in Vermont which plaintiff and his alleged successor "trustee" have not purported to remove or take possession of although said trust was and is a single and indivisible unit which had been continuously administered in Vermont as such by the said Vermont trustee, Josephine G. Avery; that plaintiff's removal from Vermont of said trust cash and securities was without notice to defendant, who was then in Vermont as plaintiff knew, or to the Rutland, Vermont, Probate Court, where the deceased trustee's will had been filed and was pending probate, or to the executor therein named, George G. Smith, of said Rutland, Vermont.

13. Answering paragraph "24" of the complaint, defendant is without knowledge or information of the allegations thereof and therefore denies the same. Defendant alleges that on January 10, 1963 plaintiff tendered defendant certain shares of trust stocks and certain bonds, aggregating considerably less than one-third thereof, provided defendant would, in advance, execute a paper recognizing said Bender's claim to a full one-third of all the trust property, which defendant declined to do in view of Bender's said release under seal of November 29, 1939 of any claim by her personally to trust "principal or income". Defendant further alleges that plaintiff has since wholly refused to turn over to defendant any of the trust property that is admittedly his and that not even a tender was ever made to defendant of any of the said trust cash and bond coupons, and, on information and belief, that said assets of the trust are in plaintiff's possession or under his control in New York.

Further answering said paragraph "24", defendant denies that a one-third interest in the oil royalty and award therein referred to have ever been validly "assigned" by

anyone to said Bender and alleges that the Humble Oil & Refining Co., and Treasury Department of the United States, respectively, have placed the one-third thereof claimed by Bender in suspense, without prejudice to defendant's claim to one-half thereof, pending a judicial determination of Bender's said release. Defendant further alleges that of the trust stocks placed in the names of Bender and Feuerlicht, both individually and as alleged "successor trustees", now in plaintiff's possession or control, all have been duly sequestrated by the Vermont Court of Chancery by writ of sequestration issued April 29, 1963, excepting such shares in American Can Co., American Telephone & Telegraph Co. and Consolidated Edison Co. of N. Y., which do not have agents in Vermont to receive the service of process; that as to these companies, on information and belief, "office stops" have been imposed against any disposition by Bender of shares now in her name pending an adjudication of her said release under seal.

Further answering, defendant alleges that in addition to the foregoing, said trust safe deposit box contained, on information and belief, some seventy-five deeds and promissory notes, including property of Josephine G. Avery, personally; that on or about March 15, 1963 plaintiff again entered said safe deposit box, *ex parte* as before, and removed the entire contents thereof, purporting to close out said box although the deceased trustee had herself paid rental thereon down to June 27, 1963, in advance of her death.

14. In answer to paragraph numbered "25" of the complaint, defendant repeats, reiterates and realleges each and every admission, denial and allegation of paragraphs 1 through 13 herein.

15. Defendant denies the allegations of paragraph "26" of the complaint, except that he admits that he wrote and

mailed the letter dated January 9, 1963 therein referred to as Exhibit "A" to the addresses stated therein.

16. Defendant denies the allegations of paragraph "27" of the complaint and alleges that said Exhibit "A" speaks for itself. Defendant alleges that the said Exhibit, as well as Exhibits "B" through "G" hereinafter referred to, were written in response to plaintiff's unwarranted removal of the trust property from its depository in Vermont during which time the Will of the sole trustee, Josephine G. Avery, was pending probate before the Probate Court, Rutland, Vermont. Defendant further alleges on information and belief that prior to said removal plaintiff, Miss Bender and Mrs. Feuerlicht were aware that defendant regarded the November 29, 1939 release executed by Miss Bender as an effective bar to any claim she might have otherwise had to the income or principal of the trust, and that defendant also considered Miss Bender's and Mrs. Feuerlicht's claim to be successor trustees as untenable. On information and belief, defendant further alleges that plaintiff did not apprise the transfer agents, and other addressees mentioned in said Exhibits, of defendant's position and did not submit for their independent consideration the release executed by Miss Bender, or a copy thereof. Defendant further alleges, on information and belief, that plaintiff knew when he presented his requests for transfer of the trust securities to said transfer agents that defendant intended to seek a judicial determination of the rights and interests of the defendant herein and Miss Bender and Mrs. Feuerlicht to the trust, and further that plaintiff, prior to the time defendant wrote Exhibits "A" through "G", had not apprised said transfer agents and addressees of this fact. Defendant also alleges that said Exhibits were written to apprise the transfer agents and addressees of

defendant's position and to provide them with all relevant documents theretofore not submitted by plaintiff, and to seek a *status quo* of the trust securities pending final judicial determination of the rights of the defendant, Miss Bender and Mrs. Feuerlicht to said trust property, and that defendant instituted an action in Chancery, Rutland County, Vermont on February 28, 1963, to seek such a determination.

17. Defendant denies each and every allegation set forth in paragraphs "28" and "29" of the complaint.

SUMMARY OF ANSWER TO CAUSES OF ACTION "SECOND" THROUGH "SIXTH" (PARAGRAPHS 18-37 INCLUSIVE)

These allegations repeat and reallege all of the allegations, admissions and denials set forth in paragraphs 1 through 14 of the answer to the first count, reallege the allegations of paragraph 16 of the answer, admit that defendant wrote and mailed the letters in question (Complaint Exhibits B-F inclusive) and denies the balance of the complaint.

IN ANSWER TO PLAINTIFF'S ALLEGED "SEVENTH CAUSE OF ACTION"

38. Answering paragraph "55" of the complaint, defendant repeats and realleges each and every allegation and denial contained in paragraphs 1 through 14 herein which are in answer to paragraphs "1" through "25" of the complaint.

39. Plaintiff denies the allegations of paragraph "56" of the complaint, except that he admits that he wrote and mailed the letter dated February 20, 1963 therein referred to as Exhibit "G" to the Special Administrator of the estate of the deceased trustee, said Josephine G. Avery, the addressee therein named.

Answer.

40. Defendant denies the allegations of paragraph "57" of the complaint and restates and realleges the allegations contained in paragraph 16 herein.

41. Defendant denies each and every allegation set forth in paragraphs "58" and "59" of the complaint.

* * * * * *

AS AND FOR A THIRD SEPARATE AND COMPLETE DEFENSE TO PLAINTIFF'S ALLEGED FIRST, SECOND, THIRD, FOURTH, FIFTH, SIXTH AND SEVENTH "CAUSES OF ACTION"

46. Defendant repeats and realleges each and every allegation, admission and denial contained in paragraphs 1 through 41 of this answer.

47. Each of the aforesaid seven communications alleged by plaintiff (Exhibits A-G inclusive) was a privileged communication made by defendant:

(a) as an interested and necessary party in a judicial proceeding then pending in the Probate Court for the District of Rutland, Vermont (*In the Matter of the Estate of Josephine G. Avery, deceased*, Docket No. 19 P 75) involving the probate of the Will of defendant's mother, Josephine G. Avery, and the appointment of a personal representative of her estate who is chargeable with the collection, winding up and distribution of the property of which she was sole trustee;

(b) as a party to contemplated litigation over the distribution of said trust which was thereafter promptly instituted in the Vermont Court of Chancery (*Avery* v. *Bender, et al.*, No. 2634) wherein plaintiff has appeared and participated as counsel for the defendant Bender therein; and

(c) as a party to counter litigation thereafter instituted by this plaintiff in the New York Supreme Court, New York County (*Matter of Feuerlicht and Bender, etc.* v. *Avery,* Index No. 9004-1963) wherein this defendant is the respondent, plaintiff is an attorney for the petitioners and at the trial of said proceeding plaintiff herein offered in evidence each of said seven communications (Exhibits A-G inclusive, as petitioners' exhibits therein Nos. 255, 360, 345, 281, 234, 304 and 181 respectively).

Each of said seven communications was and is relevant, pertinent and material to matters involved in said judicial proceedings and was addressed solely to persons having a legal interest in the subject matter thereof. Said seven communications, and each of them, are, therefore, absolutely privileged as made by a party to judicial proceedings, in connection therewith and concerning matters material thereto.

* * * * * *

WHEREFORE, defendant demands judgment dismissing the complaint, together with the costs and disbursements of this action.

Dated: February 13, 1964.

SULLIVAN & CROMWELL,
Attorneys for Defendant,
Office & P.O. Address,
48 Wall Street,
New York 5, New York,
Telephone: HAnover 2-8100.

Verified February 13, 1964.

Exhibit A, to Answer.

EMPLOYMENT LETTER JOSEPHINE G. AVERY, TRUSTEE TO EMILIE B. BENDER, DATED NOVEMBER 29, 1939

November 29, 1939

Miss Emilie B. Bender,
Middletown Springs, Vt.
Dear Miss Bender:

As you have accounted for and turned over the principal and income of the Avery Trust to me as your successor trustee under Deed of Trust of September 12, 1921, and amendments, I hereby acknowledge receipt from you of bill of sale and inventory book, together with all of the securities and accompanying papers therein described.

I hereby appoint you as Clerk and accountant to attend to the records, bookkeeping, banking, etc., relating to the trust. Will you please keep record of the time which you spend in connection with the trust, for which you will be paid at a rate to be agreed on monthly.

Very truly yours,

/s/ JOSEPHINE G. AVERY, Trustee

Stipulation Amending Answer.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the answer of the defendant, dated February 13, 1964, be deemed duly amended by the addition of a Sixth, Separate and Complete Affirmative Defense, reading as follows:

"52. Defendant repeats and realleges each and every allegation, admission and denial contained in paragraphs '1' through '41' of this Answer.

53. Defendant alleges that on or about June 9, 1963, the plaintiff Owens as the agent and attorney both at law and in fact of one Emilie B. Bender brought a special proceeding in the New York County Supreme Court against Albert G. Avery, the defendant herein, alleging in his petition that this defendant had wilfully and maliciously interfered with his client as an alleged liquidating trustee of a then terminated *inter vivos* trust, of which this defendant was a vested remainderman, by writing, among others, the seven letters herein sued upon and seeking an injunction therein against this defendant from such interference. Defendant interposed a general denial to those allegations. Thereafter and on December 7, 1964, following a trial on the merits before Special Referee Gerald Mazur, wherein said seven letters were received in evidence and considered by him on this exact issue, he rendered his decision, finding that this defendant had published said letters "under color of right to protect

a fund in which he had an interest from what he believed to be improper administration and unlawful distribution," and directing the settlement and entry of judgment accordingly; that final judgment in accordance with said decision and findings was thereupon entered by this defendant in New York County on December 16, 1964 in his favor and denying the injunctive relief requested on the ground of said alleged "malicious" interference as against the petitioner Bender and her successors in interest (she having died meanwhile on June 19, 1964 and her executor, Walter G. Bender, having been duly substituted as a party in said special proceeding) with whom this plaintiff Owens, as her known agent and attorney and who instituted, conducted and controlled said special proceeding, is in privity; that plaintiff Owens is now wholly estopped and barred by said findings and the final judgment entered thereon from maintaining this action based upon said seven letters (Complaint, Exs. A-G, inclusive).

Dated: New York, N. Y., July 29, 1965.

/s/ BENTLEY & OWENS,
Attorneys for Plaintiff.

/s/ RICHARD STEEL,
Attorney for Defendant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1262

ALBERT G. AVERY,

Petitioner,

vs.

ROBERT W. OWENS, JR.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD S. BENTLEY,
Attorney for Respondent,
20 Exchange Plaace,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. .....

ALBERT G. AVERY,

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ROBERT W. OWENS, JR.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent does not agree with the petitioner's statement of the "Questions Presented" (brief p. 2) or his "Statement of the Case" (brief pp. 3-8), both of which are, in the opinion of the respondent, inaccurate, incomplete and misleading, and assert as facts matters that are merely the petitioner's contentions.

The Question Presented

The only question presented is:

> Whether the determination of the Special Referee in a proceeding in the Supreme Court of the State of New York, New York County, brought by Katharine A. Feuerlicht and Emile B. Bender, as trustees, against the petitioner herein under Article 79 of the New York

Civil Practice Act (*Matter of Feuerlicht* v. *Avery*, New York Law Journal, December 7, 1964, aff'd 24 A D 2d 555), was dispositive of the issues in the within libel action?

The Special Term of the New York Supreme Court held that it was not dispositive and that triable issues were presented (Appendix p. 2a). The Appellate Division of the New York Supreme Court, First Department, unanimously affirmed without opinion (25 A D 2d 498). The New York Court of Appeals denied the petitioner's application for leave to appeal (N.Y.L.J. April 27, 1966).

Statement of the Case

The respondent is an attorney and counselor-at-law of the State of New York, and is now, and has been for more than forty years last past, engaged in active practice in New York City. The petitioner is one of the remaindermen of a trust established by his father and mother, Brainard and Josephine G. Avery.

The said trust was created on September 12, 1921 in the City and State of New York by Brainard and Josephine G. Avery who at the time were residents of New York. The corpus of the trust consisted of personal property then situated in New York. The term of the trust was for the joint lives of Brainard and Josephine and the survivor. It was amended on April 23, 1937 (Fourth Amendment) so as to provide that upon the death of Brainard the income should be paid to Josephine and to Emilie B. Bender in specified proportions, and that upon the death of Josephine the principal should be distributed one-third to the petitioner, one-third to his sister Katharine (now Katharine A. Feuerlicht) and one-third to Miss Bender. The validity of this amendment was sustained by the Vermont Supreme Court in 1954 (*Avery* v. *Bender*, 119 Vt. 313).

By amendment made on November 28, 1939 (Sixth Amendment), the settlors appointed Katharine and Miss Bender as trustees upon the death of Josephine. In or about 1941, the settlors moved to Vermont and later removed the trust securities to that state.

Josephine survived Brainard and died on December 7, 1962.

After the death of Josephine, Mrs. Feuerlicht and Miss Bender, then residents of the State of New York, duly qualified as trustees, removed the trust assets to New York, and commenced their distribution to the plaintiff, to Mrs. Feuerlicht and to Miss Bender in equal shares, in accordance with the terms of the trust.

The petitioner, dissatisfied with the provisions of the trust, and claiming and representing to transfer agents and others that Mrs. Feuerlicht and Miss Bender were not trustees and that Miss Bender, by a paper dated November 29, 1939, had relinquished all interest in the principal and income of the trust (erroneously, as was held in *Matter of Feuerlicht* v. *Avery,* 19 A D 2d 862), and that the removal of the trust assets from Vermont to New York was unlawful, attempted, by means of such claims and representations to interfere with the trustees' administration of the trust and to prevent them from distributing any part of the assets to Miss Bender.

Seven of the letters so written by the petitioner contained the libelous material sued upon in the within action.

Petitioner's motion to dismiss the complaint for insufficiency was previously denied (*Owens* v. *Avery,* 23 A D 2d 722). The case is now at issue but has not yet been tried.

The judgment which the petitioner claims gave rise to a so-called "collateral estoppel", was entered in the aforesaid proceeding of *Matter of Feuerlicht* v. *Avery,* 19 A D

2d 862. The respondent was one of the attorneys for the trustees in said proceeding, but was not a party to said proceeding, or in privity with any party.

The judgment entered therein determined, adversely to the claims of the petitioner, that Mrs. Feuerlicht and Miss Bender were trustees of the said trust, and that Miss Bender had not released her interest in the trust. The judgment nowhere contained the supposed adjudication on which the petitioner relies for his claim of "collateral estoppel". Such claim is based upon a dictum of the Special Referee in which he said:

> "With respect to the injunctive relief herein sought, there is no doubt that the record herein supports a finding that respondent has interfered with the administration of the trust. However, this proceeding has been brought pursuant to Article 79 of the CPA (now article 77 of the CPLR), the purpose of which is to provide an expeditious special proceeding rather than an action for disputes arising out of trust accountings, construction and related trust matters (See Ninth Annual Report of the Judicial Council (1943) p. 305, et seq.). Injunctive relief and other drastic remedies do not appear to have been contemplated by this simplified procedure. The fact that determinative references of the issues in a proceeding relating to an express trust are permitted does not give a referee the authority to determine issues which are only collaterally related to the trust issues and which are more properly the subject of actions. Such authority will not be presumed in this proceeding.
>
> Moreover, even if authority to grant injunctive relief were present in this proceeding, the advisability of such relief at this time would be questionable. Respondent heretofore had acted under some color of right to protect a fund in which he had an interest from what he believed to be improper administration and wrongful distribution. He is a member of the bar

of this state. At this juncture there is no reason to contemplate that he will ignore or in any way be contumacious of the ultimate mandate of the courts of this state."

Conclusion

It is respectfully submitted that the petition for a writ of certiorari to the Appellate Division of the New York Supreme Court, First Judicial Department, should be denied because: (1) The order sought to be reviewed did not finally determine the within action; (2) the judgment relied upon by the petitioner for his claim of collateral estoppel did not contain the adjudication that the petitioner attributes to it; (3) no constitutional or federal question is involved; (4) no novel or important issues of law are involved; (5) *New York Times* v. *Sullivan*, 376 U. S. 254, and subsequent cases have no application to the respondent, who was not a public official and was not engaged in a discussion of public issues; and (6) the order sought to be reviewed was correct and proper.

Dated: April 28, 1966.

Respectfully submitted,

Edward S. Bentley,
Attorney for Respondent,
20 Exchange Place,
New York, N. Y. 10005.